No. 97-1795-CFX Title: Equality Foundation of Greater Cincinnati, Inc., et al., Petitioners
v.
City of Cincinnati, et al.

Docketed:
May 6, 1998 Court: United States Court of Appeals for the Sixth Circuit

Entry	Date	Proceedings and Orders
	May 4 1998	Petition for writ of certiorari filed. (Response due June 24, 1998)
	May 7 1998	Brief amicus curiae of National Fair Housing Alliance filed.
	May 11 1998	Order extending time to file response to petition until June 24, 1998.
	May 21 1998	This extension is granted for all respondents.
	Jun 23 1998	Brief of respondent City of Cincinnati in opposition filed.
	Jun 23 1998	Brief of respondent Equal Rights, Not Special Rights in opposition filed.
	Jun 24 1998	Brief amici curiae of City of Aspen, et al. filed.
	Jul 7 1998	Reply brief of petitioners Equality Foundation of Cincinnati, et al. filed.
	Jul 8 1998	DISTRIBUTED. September 28, 1998
	Oct 5 1998	REDISTRIBUTED. October 9, 1998
	Oct 13 1998	Petition DENIED. Opinion respecting denial by Justsice Stevens with whom Justice Souter and Justice Ginsburg joins. (Detached opinion.)

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No. 97-

Supreme Court, U.S.
FILED

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IN THE

Supreme Court of the United States

OFFICE OF THE CLERK

OCTOBER TERM, 1997

EQUALITY FOUNDATION OF GREATER CINCINNATI, INC., RICHARD BUCHANAN, CHAD BUSH, EDWIN GREENE, RITA MATHIS, ROGER ASTERINO, and H.O.M.E., INC.,

Petitioners,

—v.—

THE CITY OF CINCINNATI, EQUAL RIGHTS NOT SPECIAL RIGHTS, MARK MILLER, THOMAS E. BRINKMAN, JR., and ALBERT MOORE,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether a city charter amendment that is indistinguishable in all material respects from the state constitutional amendment invalidated in *Romer v. Evans* and that likewise bars anti-discrimination protections only for gay, lesbian and bisexual citizens violates the Equal Protection Clause?

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PETITION FOR WRIT OF CERTIORARI

Petitioners respectfully petition for a writ of certiorari to review the judgment entered by the United States Court of Appeals for the Sixth Circuit in this proceeding.

PRIOR OPINIONS AND ORDERS

This Court's Order granting certiorari, vacating a prior judgment of the Court of Appeals for the Sixth Circuit and remanding is reported at 518 U.S. 1001 (1996) and is reprinted in the Appendix ("App.") at 24a. The opinion of the Court of Appeals for the Sixth Circuit on remand is reported at 128 F.3d

289 (6th Cir. 1997). App. 1a. The Order of the Court of Appeals denying rehearing is reprinted in the Appendix. App. 126a. The initial, vacated opinion of the Court of Appeals for the Sixth Circuit is reported at 54 F.3d 261 (6th Cir. 1995). App. 26a. The opinions of the District Court for the Southern District of Ohio are reported at 860 F. Supp. 417 (S.D. Ohio 1994) (granting permanent injunction), App. 46a, and at 838 F. Supp. 1235 (S.D. Ohio 1993) (granting preliminary injunction), App. 109a.

JURISDICTION

The Court of Appeals for the Sixth Circuit entered judgment on October 23, 1997. App. 1a. Petitioners' timely petition for rehearing and suggestion for rehearing en banc was denied on February 5, 1998. App. 126a. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND CITY CHARTER PROVISIONS INVOLVED

The Equal Protection Clause of the Fourteenth Amendment to the United States Constitution provides in pertinent part:

> No State shall . . . deny to any person within its jurisdiction the equal protection of the laws.

On November 2, 1993, the Cincinnati voters passed Amendment XII to the City Charter of the City of Cincinnati. This provision, which was designated on the ballot and is generally known as Issue 3, reads as follows:

> NO SPECIAL CLASS STATUS MAY BE GRANTED BASED UPON SEXUAL ORIENTATION, CONDUCT OR RELATIONSHIPS.
>
> The City of Cincinnati and its various Boards and Commissions may not enact, adopt, enforce or administer any ordinance, regulation, rule or policy which provides that homosexual, lesbian, or bisexual orientation, status, conduct, or relationship constitutes, entitles, or otherwise provides a person with the basis to have any claim of minority or protected status, quota preference or other preferential treatment. This provision of the City Charter shall in all respects be self-executing. Any ordinance, regulation, rule or policy enacted before this amendment is adopted that violates the foregoing prohibition shall be null and void and of no force or effect.

PRELIMINARY STATEMENT

This case merits review because the Sixth Circuit, on remand, has failed in its duty to apply this Court's ruling in *Romer v. Evans*, 517 U.S. 620, 116 S.Ct. 1620 (1996). The measure at issue here, Cincinnati's Issue 3 charter amendment, is identical in all material respects to Colorado's "Amendment 2," the measure invalidated by this Court in *Romer*.[1] Both measures

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[1] Amendment 2 provided: No Protected Status Based on Homosexual, Lesbian, or Bisexual Orientation. Neither the State of Colorado, through any of its branches or departments, nor any of its agencies, political subdivisions, municipalities or school districts, shall enact, adopt or enforce any statute, regulation, ordinance or policy whereby homosexual, lesbian or bisexual orientation, conduct, practices or relationships shall constitute or otherwise be the basis of or entitle any person or class of persons to have or claim any minority status, quota preferences, protected status or claim of discrimination. This Section of the Constitution shall be in all respects self-executing. *Romer*, 116 S.Ct. at 1623.

target only gay, lesbian and bisexual citizens. Both measures ban legal protection against discrimination only for that targeted group. And both measures bind all government officers in their respective political jurisdictions.

This Court struck down Colorado's Amendment 2 in *Romer* because it violated the literal terms of the Equal Protection Clause and because its classification of gay people lacked a rational basis. Issue 3 suffers these same defects and cannot be sustained on any ground. In dissent from denial of rehearing, six judges of the Sixth Circuit agreed. They recognized that the Equal Protection Clause binds city governments as it does states and that there is no basis under *Romer* to sustain Issue 3. Like Amendment 2, Issue 3 "classifies homosexuals not to further a proper legislative end but to make them unequal to everyone else. This Colorado cannot do," *Romer,* 116 S.Ct. at 1629, and neither may Cincinnati. Certiorari should therefore be granted and the decision of the Sixth Circuit summarily reversed or subjected to plenary review.

STATEMENT OF THE CASE

1. *The Scope and Effect of Issue 3*

In 1993, a proposed amendment to the municipal charter of the City of Cincinnati was placed on the ballot as Issue 3, largely by the efforts of respondent Equal Rights Not Special Rights ("ERNSR") through its predecessor Take Back Cincinnati. Its drafters patterned the measure's text after the Colorado Amendment 2 ballot measure that became the subject of *Romer v. Evans*, 116 S.Ct. 1620. R. 89: Tr. at 584-85.[2] Issue 3's text, like that of Amendment 2, reflects an intent to disadvantage lesbians, gay men and bisexuals and evinces anti-gay animus. In extraordinarily sweeping language, Issue 3 proposed to bar the

[2] The full record in the District Court will be referred to as "R." References to the Joint Appendix before the Court of Appeals will be described as "Jt. App." Plaintiffs' exhibits and joint exhibits not included in the Joint Appendix will be referred to respectively as "Pltf. Ex." and "Jt. Ex."

City from undertaking to "enact, adopt, enforce or administer" any present or future "ordinance, regulation, rule or policy" within its sights.

As with Amendment 2, Issue 3's sights were focused solely on lesbians, gay men and bisexuals. The Cincinnati amendment's terms bar any action by the City that might be construed to give "protected status" -- that is, legal protection against discrimination -- to any person on the basis of "homosexual, lesbian or bisexual orientation, status, conduct or relationship," as well as any action that might give "minority status" or "preferential" treatment on those bases, whether now or in the future. The scope and design of this measure were unprecedented in Cincinnati's history. One expert witness on civil rights matters who testified at the trial in this case aptly described Issue 3 as the "nuclear bomb" of charter amendments. R. 18:172.

Prior to the Issue 3 ballot measure, the City had enacted a Human Rights Ordinance that protected all persons against discrimination based on the "protected class status" of sexual orientation (as well as Appalachian regional ancestry, marital status and many other characteristics) in private employment, housing and public accommodations. Jt. App. 683. The City Council passed this measure in 1992 after documenting extensive discrimination based on sexual orientation and in response to its findings about the "profound effects of such discrimination." Jt. App. 670. The City Council even earlier had enacted an Equal Employment Opportunity Ordinance that protected all persons against discrimination on the basis of sexual orientation (and other characteristics) in public employment. Jt. App. 668.[3]

[3] The City Council has since repealed the provisions of the Human Rights Ordinance forbidding discrimination on the basis of sexual orientation. However, Issue 3 would amend the Equal Employment Opportunity Ordinance, which still contains sexual orientation-based protections, and prevent passage of any future civil rights protections for gay people.

As was the case with Colorado's Amendment 2, inclusion of sexual orientation as a protected class in these measures was the impetus for Issue 3's introduction. Jt. Ex. X at 43; Jt. App. 457; App. 2a-3a; *Romer*, 116 S.Ct. at 1623. The immediate effect of Issue 3 would be to nullify these anti-discrimination laws, *but only* insofar as they applied to lesbians, gay men and bisexuals; by contrast, the proposed charter amendment would have no effect on existing and future protections conferred by the City on heterosexuals or any other protected classes. App. 65a-66a.

The ban on according "protected status" to gay people imposed by Issue 3 also would prevent the future inclusion of lesbians, gay men and bisexuals within any anti-discrimination law or protective policy and would preclude any municipal response to many documented problems of anti-gay discrimination. App. 65a-66a. Examples of anti-gay discrimination and harassment by private actors and public officials, including court officials and police officers, abound in the trial record, which includes the legislative record compiled by the City Council prior to passage of the Human Rights Ordinance.[4] Normally, such concerns are corrected by approaching City officials or working to secure passage of class-specific remedial legislation responding to discrimination based on particular traits. R. 89:65. But City officials could not design or enforce specific measures to remedy anti-gay discriminatory acts under Issue 3. Existing City programs designed to serve the gay community also are imperiled by the broad sweep of the proposed measure. These include an HIV-prevention program directed at gay men that, while undeniably of benefit to the entire public, might be construed by some to give "preferential treatment" to gay people. Pltf. Ex. 17.

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[4] *See, e.g.*, Pltf. Ex. 393 (complaint to City Manager about violence and harassment); Pltf. Ex. 394 (complaint about police flyer that employed the term "fag" bars); Pltf. Ex. 395 (1988 statewide survey on discrimination against lesbians, gay men and bisexuals); Pltf. Ex. 398 at 5-7 (summary of anti-gay acts by police and discrimination complaints by lesbians, gay men and bisexuals); Jt. App. 388-90; 402-03; 425-26.

2. *The Context of Issue 3's Passage*

The context of Issue 3's passage, like that of Amendment 2 in *Romer*, corroborates the conclusion that the Cincinnati charter amendment was rooted in animus toward lesbians, gay men and bisexuals. Issue 3's passage was accomplished, as the District Court found, by means of ERNSR campaign materials and advertisements that were "grossly inaccurate" and "riddled with unreliable data, irrational misconceptions and insupportable misrepresentations about homosexuals." App. 95a, 62a.

Gay people were described in the most "inflammatory" terms and were portrayed, for example, as habitually engaging in bizarre sexual practices, including some "which allegedly involve the use of rodents." App. 82a n.16.[5] Expert witnesses in political history and on civil rights issues pointed out that the inaccurate sexual stereotyping of lesbians, gay men and bisexuals during the Issue 3 campaign has direct historical parallels in arguments used to malign African-Americans, Jews, and Mexican-Americans. Jt. App. 442; 739-40.

ERNSR also distributed "patently misleading" materials that mischaracterized Issue 3 and the Human Rights Ordinance to sway potential voters. App. 62a and n.7. In particular, the Human Rights Ordinance, which prohibited sexual orientation discrimination against all Cincinnatians, was consistently and

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[5] In the District Court, petitioners presented extensive evidence to counter the malicious stereotypes that pervaded ERNSR's campaign. Detailed psychological and historical testimony, supported by a thorough review of authorities, explained the nature of sexual orientation as a deeply rooted aspect of human identity. The testimony illustrated as well that gay men and lesbians have been subjected to intense discrimination based on their sexual orientation. *See, e.g.*, Jt. App. 322-28J; 644-45; 754-74; 823-94. Respondents offered no evidence to validate the gross factual distortions about lesbians, gay men and bisexuals that were provided to voters during the Issue 3 campaign or to rebut petitioners' expert evidence on the nature of sexual orientation and anti-gay discrimination. App. 56a-58a.

misleadingly referred to as providing "'special rights' for homosexuals." *Id. See, e.g.*, Pltf. Exs. 34; 39. *Cf. Romer*, 116 S.Ct. at 1626-27. Campaign literature also billed Issue 3 as a mere repealer of the Human Rights Ordinance when in fact it would eliminate similar protections for lesbians, gay men and bisexuals now and in the future. App. 62a and n.7; Pltf. Ex. 34.

At trial, civil rights experts reviewed the above materials and concluded that Issue 3 was sold to voters through naked appeals to prejudice and "base" instincts. *See, e.g.*, Jt. App. 394. Thus, as a ballot proposal, Issue 3 was turned into an "up/down" vote on gay people. Jt. App. 400. *See also* R. 89:4, 521.[6]

3. *The Proceedings in the District Court*

Issue 3 was adopted by the voters of Cincinnati on November 2, 1993, and this suit was filed immediately thereafter. After conducting a day-long evidentiary hearing, the District Court issued a preliminary injunction barring enforcement of Issue 3 on November 16, 1993. *See* App. 109a-125a. After five additional days of testimony taken in June 1994 and upon consideration of a "massive" record, App. 59a, the District Court permanently enjoined Issue 3 on August 9, 1994.

In granting these injunctions against Issue 3, the District Court determined that the measure's "sweeping prohibition would include, but would not be limited to, any anti-discrimination measures on behalf of gays, lesbians and bisexuals." App. 65a. That effect, evident from the face of the law, was the uncontested aim of its drafters. App. 2a-3a, 62a n.7. Moreover, it is

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[6] Issue 3's proponents admitted that the measure aimed to reduce the political power and influence of gay people within the City of Cincinnati. Phil Burress, one of the primary instigators of Issue 3, testified that the Human Rights Ordinance "was only 10 percent of the issue. Ninety percent of the problem was the fact that the homosexuals . . . were going to start pushing their agenda through their elected officials." Jt. Ex. X at 43. He and Chris Finney, who drafted the actual text of Issue 3, both freely admitted that the amendment was designed as a direct response to the perception of growing gay political power in Cincinnati. Jt. App. 457.

undisputed, as the District Court found, that Issue 3 foreclosed all municipal remedial routes, except for the charter amendment process, for gay people seeking class-specific protection from sexual orientation discrimination and related harms. App. 65a-66a. Comparing the "exceptionally arduous and costly," App. 122a, charter amendment process to the wide array of routes available to all others desiring anti-discrimination protections, the court found that "amending the city charter is a far more onerous and resource-consuming task." App. 62a, 64a. The court also found that the campaign materials used by ERNSR to promote Issue 3 "emphasize[d] the depth and pervasiveness of the inaccurate and unfounded stereotypes about gays, lesbians and bisexuals in our society." App. 62a n.7. Finally, the court concluded that no alleged interest asserted by the proponents of Issue 3, including cost savings, could explain or justify the classification of gay people drawn by the measure. App. 90a-96a.

The District Court determined from Issue 3's text, structure and singular focus, as well as the record evidence, that Issue 3 enacted private prejudice into law and did not serve any legitimate governmental purpose. The court held:

> [W]e can conceive of no legitimate governmental purpose *rationally related* to a law which prohibits a minority group from *ever* obtaining anti-discrimination legislation on its behalf, unless it undertakes the massive and unmitigated -- and likely insurmountable -- burden of amending the city charter. Such a law implies nothing more than a "bare desire to harm an unpopular group" based on who the members of that group are. The purpose not only to permit discrimination, but also to encourage it, is inherent in the very concept of such a law. As such it is constitutionally defective. *[United States Dept. of Agriculture v.] Moreno*, 413 U.S. [528,] 534, 93 S.Ct. [2821,] 2825-26 [(1973)]; [*City of*] *Cleburne [v. Cleburne Living Ctr., Inc.*], 473 U.S. [432,] 446-47, 105 S.Ct. [3249,] 3257-58 [(1985)].
>
> . . . Issue 3, far from demonstrating governmental neutrality on the issue of homosexuality, in fact, gives

> effect to private prejudice. This, the Constitution will not tolerate. *Palmore v. Sidoti*, 466 U.S. 429, 433, 104 S.Ct. 1879, 1882, 80 L.Ed.2d 421 (1984). . . . Such a strong message from the government, embodied in the City's fundamental law, effectively places the government's imprimatur on those acts of private bias carried out pursuant to Issue 3's unmistakable mission.

App. 96a-97a (emphasis in original).

4. *The Sixth Circuit's Initial Ruling*

In its initial ruling, the Court of Appeals reversed the District Court judgment on all grounds.[7] The court determined that rational basis review was the appropriate standard and went on to conclude that several rational bases existed to uphold Issue 3. These included the supposed enhancement of "associational liberty" that was judged to flow from Issue 3 insofar as it reauthorized acts of discrimination against gay citizens. App. 43a. The court also opined that Issue 3 would reduce government regulation, "which necessarily may result in some cost savings for the City's taxpayers." App. 43a. Nowhere in its opinion did the Court of Appeals give consideration to the District Court's pivotal determination that Issue 3 gave effect to private prejudice.

5. *The Court's Order on Writ of Certiorari*

Plaintiffs petitioned for a writ of certiorari to review the Sixth Circuit's ruling. After issuing its decision in *Romer*, 116

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[7] The District Court also had held that Issue 3 violated the Equal Protection Clause by infringing upon petitioners' fundamental right of equal political participation. App. 75a. Petitioners previously sought review of the Sixth Circuit's reversal of this ruling from the Court and it provides an alternate ground for decision. However, the issue was not reached in *Romer* and therefore was not briefed anew on remand. The District Court had further ruled that Issue 3 violated First Amendment rights to freedom of speech and association and to petition for redress of grievances; that classifications based on sexual orientation are quasi-suspect; and that Issue 3 was void for vagueness. *See* App. 77a-89a, 97a-108a. Petitioners did not seek review of the Sixth Circuit's initial reversal of these other rulings.

S.Ct. at 1620, this Court granted the writ, vacated the ruling below, and remanded "for further consideration in light of *Romer v. Evans*." App. 24a. Justice Scalia dissented from the decision to remand, joined by the Chief Justice and Justice Thomas, arguing that *Romer* did not control city laws and that a majority of the people in cities may decide "in democratic fashion, not to accord special protection to homosexuals." App. 24a.

6. *The Sixth Circuit's Ruling on Remand*

On remand, the same Sixth Circuit panel opined that *Romer* did not control this case, adopting the view of the dissenters from the Court's decision to remand for review in light of *Romer*. Relying on a series of internally inconsistent conclusions and several direct departures from this Court's rulings in *Romer*, the court distinguished Issue 3 from Amendment 2. The panel opined that this Court's holding that Colorado's Amendment 2 violated the Equal Protection Clause "in the most literal sense" was an "'extra-conventional' application of equal protection principles [that] can have no pertinence to the case *sub judice*." App. 15a.

The Court of Appeals recognized that Issue 3 prohibited gay people from obtaining any protection from the City under current or future anti-discrimination laws. App. 13a-14a, 21a. But it nevertheless concluded that the measure was distinct from Amendment 2 because it "merely prevented homosexuals, as homosexuals, from obtaining special privileges and preferences (such as affirmative action preferences or the legally sanctioned power to force employers, landlords, and merchants to transact business with them) from the City." App. 13a. The Sixth Circuit persisted in the view that civil rights laws provide "special rights" or "special protections" to gay people and others, *e.g.*, App. 13a, 14a, 16a, 17a, 18a, 22a, 23a, even after quoting this Court's express rejection of that position in *Romer*. App. 9a-10a (quoting *Romer*, 116 S.Ct. at 1627).

The Sixth Circuit also attached great significance to the "ominous" possible impact of Amendment 2 upon laws of general applicability. The court below characterized this as a determinative and "conscience-shocking effect" of the Colorado measure, not shared by Issue 3, that would strip gay people of

protections afforded all other citizens and render gay people "virtual non-citizens (or even non-persons)." App. 13a-14a. Yet, as the court elsewhere recognized, App. 11a, in *Romer*, this Court expressly declined to decide whether Amendment 2 had this effect or to rest its holdings upon this basis. *Romer*, 116 S.Ct. at 1626.

The court below also opined that city legislation enjoys a qualitatively higher level of judicial deference and protection from constitutional review than do state laws. App. 15a. The court rested heavily upon its view that a municipal voter-initiated law is entitled to supreme deference, and concluded that *Romer*

> should not be construed to forbid local electorates the authority, via initiative, to instruct their elected city council representatives to withhold special rights, privileges, and protections from homosexuals, or to prospectively remove the authority to accord special rights, privileges, and protections to any non-suspect and non-quasi-suspect group. Such a reading would disenfranchise the voters of their most fundamental right which is the very foundation of the democratic form of government.

App. 17a.

The Sixth Circuit then purported to apply this Court's rational basis analysis in *Romer* to Issue 3 and concluded that the potential cost savings from writing gay, lesbian and bisexual citizens out of the City's protective laws was sufficient to justify Issue 3.[8] App. 21a-22a. *Romer* had rejected this same rationale as inadequate to explain Amendment 2's singling out of gay people. *Romer*, 116 S.Ct. at 1629.

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[8] The Court of Appeals relied only on the cost-savings rationale but also reiterated its opinion that associational liberty and "community moral disapproval of homosexuality" remained legitimate and sufficient justifications for Issue 3, even though those purported justifications were rejected in *Romer*. App. 22a-23a.

7. *Order and Opinions on Denial of Rehearing*

A divided court denied plaintiffs' petition for rehearing and suggestion for rehearing en banc. App. 126a. In a concurring opinion, Judge Boggs expressed his view that cities "are not constitutionally cognizable political sovereignties" and therefore are not subject to the ruling in *Romer*. App. 127a.

Six judges dissented from the denial of rehearing, including Chief Judge Martin. In an opinion by Judge Gilman, the dissenters recognized that *Romer* controlled and required reversal of the panel decision. App. 130a-134a. They criticized the panel for distinguishing *Romer* based upon Amendment 2's possible effect on laws of general applicability, as this Court had not relied upon that ground. App. 132a. The dissenters also rejected the panel's city/state distinction as an "unpersuasive" rationale that reflected not the majority opinion in *Romer* but the dissent from this Court's remand of the panel's initial decision in this case. App. 132a-133a ("As a majority of the Supreme Court obviously did not share the views of the dissent, using the dissent's rationale is itself suspect."). The dissenters also rejected the cost-savings rationale accepted by the panel. Judge Gilman pointed out that in attempting to distinguish *Romer* on the basis that Coloradans statewide would not rationally care about cost savings flowing to municipalities from a ban on local antidiscrimination laws, the panel had ignored the statewide scope of Amendment 2 and the fact that all "citizens of Colorado were . . . directly affected by the measures" barred by Amendment 2. App. 133a. The dissent further emphasized: "That Issue Three is a local as opposed to a state measure is of no controlling significance for purposes of the Equal Protection Clause." App. 133a. The six dissenting judges concluded that the panel opinion

> draws "distinctions without a difference" and fails to abide by the key ruling in *Romer* that "A law declaring that in general it shall be more difficult for one group of citizens than for all others to seek aid from the government is itself a denial of equal protection of the laws in the most literal sense."

App. 133a.

REASONS FOR GRANTING THE WRIT

In *Romer v. Evans*, 517 U.S. 620, 116 S.Ct. 1620 (1996), this Court explained that laws like Colorado's Amendment 2 are rare precisely because they depart so radically from our constitutional traditions. Issue 3, a citywide clone of Amendment 2 that bars Cincinnati, *inter alia*, from prohibiting discrimination against lesbians, gay men and bisexuals, veers onto the same ignominious course. Although Issue 3 shares the structure, purpose and constitutional infirmities of the Colorado measure, the court below did nothing to halt it. The ruling below is fundamentally at odds with central constitutional tenets binding cities and states alike and irreconcilably conflicts with this Court's ruling in *Romer*. A city has no greater constitutional authority than does a state to relegate one class of citizens to permanent inequality before the law, or to allow private animus to dictate government policy. These principles are so plainly violated here, and with such damaging effect, that the Court should grant certiorari and either grant summary reversal because *Romer* so clearly controls, or set this case for plenary consideration.

Review and reversal are especially warranted because the Sixth Circuit's decision invites evasion and misconstruction of the Court's mandate in *Romer* and will spawn a new generation of legislation seeking to relegate minority groups to the status of "stranger[s]" to the law. *Romer*, 116 S.Ct. at 1629. The lower court's efforts to distinguish *Romer* are not only specious but, if left to stand, threaten to undercut severely the Court's teachings in *Romer* as well as many citywide anti-discrimination laws. Indeed, within weeks of the ruling below, a virtually identical ballot measure was circulated for signatures within the Sixth Circuit, in Ypsilanti, Michigan.[9] Whether state or local, such laws "impose[] a special disability" on the targeted class that allows permanent "exclusion from an almost limitless number of transactions and endeavors that constitute ordinary civic life in a

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[9] *See, e.g., Petitions sought in bias battle*, The Ann Arbor News, November 18, 1997, at A1; *Ordinance foes submit signatures*, The Ann Arbor News, February 3, 1998, at A1.

free society." *Id.* at 1627. Their fundamental repugnance to equal protection guarantees and the likelihood of their recurrence without the Court's intervention provide compelling grounds for review and reversal.

I. THE RULING BELOW CONFLICTS WITH *ROMER V. EVANS* BY FAILING TO APPLY THE COURT'S LITERAL VIOLATION HOLDING TO STRIKE DOWN THIS EXCEPTIONAL AND INVALID LEGISLATION.

In *Romer*, this Court unequivocally held that "[a] law declaring that in general it shall be more difficult for one group of citizens than for all others to seek aid from the government is itself a denial of equal protection of the laws in the most literal sense." 116 S.Ct. at 1628. This "literal violation" principle lies at the core of the equal protection guarantee and binds all levels of government: "[G]overnment and each of its parts [must] remain open on impartial terms to all who seek its assistance." *Id.* In the same unprecedented fashion as the Colorado measure, Issue 3 puts gay people "in a solitary class with respect to transactions and relations in both the private and governmental spheres." *Id.* at 1625. Because it prevents gay people from seeking government protection against discrimination on the same terms as all other citizens, Issue 3 is as noxious to the Equal Protection Clause as Amendment 2. This Court should grant review to stem any further efforts to deprive minority groups of government protection by similar means.

By denying "protected status" to lesbians, gay men and bisexuals, Issue 3, at a minimum, bars any protection to gay citizens under Cincinnati anti-discrimination laws as a matter of Ohio law.[10] In upholding Cincinnati's charter amendment ban on

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[10] To bring suit under any anti-discrimination law, a claimant must allege that the injury at issue occurred based on a trait that is "protected" by law. Indeed, Cincinnati's Human Rights Ordinance uses the term "protected class status" to refer to traits upon which discrimination is prohibited. Jt. App. 683. *See also Greenwood v.*

civil rights protections for gay people, the Sixth Circuit validated precisely the type of legislation this Court deemed "exceptional and . . . invalid" in *Romer,* 116 S.Ct. at 1627. Failing to absorb *Romer*'s fundamental lessons, the Sixth Circuit ruled that Issue 3's absolute bar to governmental protections for gay people fully satisfied equal protection guarantees, even declaring that the literal violation holding in *Romer* had "no pertinence to the case *sub judice*." App. 15a. But this conclusion could be reached only in disregard of the Constitution's "commitment to the law's neutrality where the rights of persons are at stake." *Romer*, 116 S.Ct. at 1623. In short, the court below embraced an amendment that creates a legal caste system among Cincinnati residents through the "'indiscriminate imposition of inequalities'" on one group. *Romer*, 116 S.Ct. at 1628 (citing *Sweatt v. Painter*, 339 U.S. 629, 635 (1950) quoting *Shelley v. Kraemer*, 334 U.S. 1, 22 (1948)).

The consequences of Issue 3 for individual lesbian, gay and bisexual citizens are devastating. They include the recognized "severe consequence," *Romer*, 116 S.Ct. at 1626, of having no protection from the injuries of discriminatory exclusion from public accommodations, as well as from employment and housing. As with Amendment 2, a class of citizens may have no recourse from the city government for class-based discrimination if, for example, a local library refuses to lend books to gay people, or a local hospital deems gay people ineligible for use of its kidney dialysis machine. Measures specifically designed to address a wave of anti-gay violence, such as a local hate-crimes measure or a policy initiative to increase protection of lesbians and gay men, would be blocked by Issue 3. In contrast, if an elderly person or a heterosexual was denied library privileges, access to a public accommodation, or police protection on the basis of age or sexual orientation, Cincinnati could respond with age-specific measures or measures specific to heterosexuals

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Taft, Stettinius & Hollister, 105 Ohio App.3d 295, 299, 633 N.E.2d 1030, 1032 (1995)(sexual orientation is a "protected status" under Cincinnati Human Rights Ordinance).

through the City Council and *all* governmental branches to redress these wrongs.

In an attempt to avoid Issue 3's obvious conflict with *Romer*, the court below distorted or ignored key aspects of this Court's opinion. The court first suggested that Issue 3 was unlike Colorado's amendment because Amendment 2 "could be construed" to bar protections for gay people under "generally applicable laws." App. 13a. Issue 3, in the lower court's view, would not excise gay people from laws of general applicability. App. 13a-14a. This ground for distinguishing *Romer* is "faulty," as the six dissenters from denial of rehearing pointed out, App. 132a, for this Court expressly declined to rest its invalidation of the Colorado amendment on that measure's application to general laws. *Romer*, 116 S.Ct. at 1625 ("'If this consequence follows from Amendment 2, as its broad language suggests, it would compound the constitutional difficulties the law creates. The state court did not decide whether the amendment has this effect, however, and neither need we.").

In addition, the Sixth Circuit's insistent characterization of Issue 3 as "eliminat[ing] only 'special class status' and 'preferential treatment'" for gay people, *e.g.*, App. 13a-14a, betrayed that court's refusal to heed another key teaching of *Romer.* This Court firmly rejected as "implausible," *Romer*, 116 S.Ct. at 1624, the notion that class-specific protections against discrimination constitute "special rights" and stated plainly:

> [W]e cannot accept the view that Amendment 2's prohibition on specific legal protections does no more than deprive homosexuals of special rights. To the contrary, the amendment imposes a special disability upon those persons alone. . . . We find nothing special in the protections Amendment 2 withholds. These are protections taken for granted by most people either because they already have them or do not need them; these are protections against exclusion from an almost limitless number of transactions and endeavors that constitute ordinary civic life in a free society.

Id. at 1627. The Sixth Circuit's misportrayal of Issue 3 provides no basis for failing to apply the literal violation holding of *Romer*.

Notwithstanding the Sixth Circuit's mischaracterizations of Issue 3 and Amendment 2, it is undeniable that both measures, by their terms, "identif[y] persons by a single trait and then den[y] them protection across the board." *Romer*, 116 S.Ct. at 1628. Like the Colorado amendment that spawned it, Issue 3 "is unprecedented in our jurisprudence" in its "disqualification of a class of persons from the right to seek specific protection from the law." *Id.* Should the Sixth Circuit's ruling be allowed to stand, measures foreclosing government protection for unpopular groups could make commonplace this disregard of basic equal protection principles. This would permit the absurd consequence that every governmental sub-unit of a state could do what the state itself could not constitutionally accomplish. By relegating gay, lesbian and bisexual citizens to the far more difficult charter amendment process to secure protections from discrimination that all other citizens can obtain through normal City channels, Issue 3 violates the Equal Protection Clause "in the most literal sense," *Romer*, 116 S.Ct. at 1628, and should be struck down.

II. THE RULING BELOW CONFLICTS WITH *ROMER V. EVANS* BY FAILING TO REQUIRE A LEGITIMATE JUSTIFICATION FOR THE CLASSIFICATION AT ISSUE AND BY UPHOLDING A MEASURE "BORN OF ANIMOSITY."

In addition to disregarding this Court's ruling that the literal terms of the Equal Protection Clause are violated by measures like Issue 3, the court below also failed to follow *Romer*'s application of rational basis review. *See Romer*, 116 S.Ct. at 1628-29. Review and reversal are warranted because the decision below fundamentally departs from *Romer* and prior cases and will encourage targeting of gay people and other groups for unconstitutional harm. Like Amendment 2, Issue 3 is a "status-based enactment" that has the purpose of harming gay citizens. *Romer*, 116 S.Ct. at 1629. It is a "classification of persons undertaken for its own sake, something the Equal Protection Clause does not permit." *Id.*

As this Court reiterated in *Romer*, "even in the ordinary equal protection case calling for the most deferential of standards, we insist on knowing the relation between the classification to be adopted and the object to be obtained." *Id.* at 1627. By insisting that "the classification bear a rational relationship to an independent and legitimate legislative end," *id.*, this Court ensures "that classifications are not drawn for the purpose of disadvantaging the group burdened by the law." *Id.* (citing *United States Railroad Retirement Bd. v. Fritz*, 449 U.S. 166, 181 (1980) (Stevens, J., concurring) ("If the adverse impact on the disfavored class is an apparent aim of the legislature, its impartiality would be suspect.")).

In applying the rational relationship test to Colorado's amendment, the Court considered a variety of proffered justifications for the state's ban on legal protections only for gay people. These included "respect for other citizens' freedom of association, and in particular the liberties of landlords or employers who have personal or religious objections to homosexuality." *Romer*, 116 S.Ct. at 1629. The Court also evaluated Colorado's purported interest "in conserving resources to fight discrimination against other groups." *Id.*

The Court pointedly dismissed all of these explanations, finding that none rationally justified the classification in the Colorado amendment. "[I]n making a general announcement that gays and lesbians shall not have any particular protections from the law, [Amendment 2] inflicts on them immediate, continuing, and real injuries that outrun and belie any legitimate justifications that may be claimed for it." *Id.* at 1628-29. The Court concluded that "the disadvantage imposed is born of animosity toward the class of persons affected," which is never a legitimate basis for government action. *Id.* at 1628 (citing *United States Dep't of Agriculture v. Moreno*, 413 U.S. 528, 534 (1973) ("[I]f the constitutional conception of 'equal protection of the laws' means anything, it must at the very least mean that a bare . . . desire to harm a politically unpopular group cannot constitute a *legitimate* government interest.") (emphasis in original).

The same rationales rejected for Amendment 2 also were offered to justify Issue 3. The District Court analyzed and

rejected each one, reaching the same conclusions regarding animus and lack of a rational basis that this Court later did in *Romer*. App. 91a-97a; *Romer*, 116 S.Ct. at 1628-29. The Sixth Circuit, however, seized upon the City's interest "in conserving public and private financial resources" -- one of the very interests this Court rejected in *Romer* -- to uphold Issue 3's permanent ban on legislation providing a specific remedy for anti-gay discrimination. App. 20a-23a & n.13.[11] To distinguish *Romer*, the Sixth Circuit opined that cost savings had failed to justify the Colorado amendment because the financial interests of citizens statewide were not implicated by a ban upon laws protecting gay people in certain cities:

> A state law which prevents local voters or their representatives, against their will, from granting special rights to gays, cannot be rationally justified by cost savings and associational liberties which the majority of citizens in those communities do not want. Clearly the financial interests and associational liberties of the citizens of the state as a whole are not implicated if a municipality creates special legal protections for homosexuals applicable only within that jurisdiction and implements those protections solely via local governmental apparatuses.

App. 20a. *Romer* contains no such reasoning. To the contrary, Amendment 2 sought to eliminate existing and future *statewide* protections as well as local measures. *Romer*, 116 S.Ct. at 1624-25. Thus, as the dissenters from denial of rehearing pointed out, App. 33a, to the extent Amendment 2 affected "the financial interests and associational liberties" of anyone, it affected those of all citizens statewide.

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[11] Two other purported rationales that had been proffered to justify Amendment 2 -- freedom of association and "moral disapproval of homosexuality" -- were credited but not relied upon by the court below, App. 22a-23a; this Court accepted neither. *See Romer*, 116 S.Ct. at 1629; *see also id.* at 1629, 1633-34 (Scalia, J., dissenting).

Moreover, a measure diminishing only the rights of heterosexuals, Catholics, or those of Appalachian ancestry shares the same potential for cost savings.[12] The correct inquiry under rational basis review is not whether Cincinnati will save money if a group is excluded from government protections, but whether Cincinnati can provide a rational and legitimate explanation for singling out one particular group -- here, gay people -- to preserve its resources. Any withdrawal of government involvement could save government funds, but it is the particular classification, or means of saving money, that must be scrutinized under equal protection principles.

The Court emphasized this very point in rejecting an identical rationale for a city zoning law in *Cleburne*, 473 U.S. at 449. There, the Court invalidated an ordinance that required a special use permit only for group homes for the mentally retarded. In analyzing several justifications proffered by the city, this Court emphasized that the only "question is whether it is rational to treat the mentally retarded differently" from all others in the community. *Cleburne*, 473 U.S. at 449. The Court discredited rationales like those offered here -- cost savings and decreased litigation exposure -- because they failed to explain why the mentally retarded were singled out. The Court concluded that the classification "appears to rest on an irrational prejudice against the mentally retarded." *Id.* at 450. *Cf. City of Cincinnati v. Discovery Network*, 507 U.S. 410 (1993) (rejecting Cincinnati's differential treatment of commercial and noncommercial newsracks as lacking the necessary "'fit' between [the City's] goals and its chosen means.").

Moreover, the purpose of Issue 3 -- to leave gay people without a remedy for the harms of discrimination -- is unlike other laws for which rational justifications are generally offered. Once a city has established means for citizens to make a plea for government protection and to obtain it, foreclosure of those avenues based merely on membership in a select group cannot be

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[12] Based on the documentation and testimony of several witnesses, the district court specifically found that no cost savings would accrue from Issue 3. App. 92a.

explained by any legitimate governmental purpose. Cincinnati would not be heard to argue, for example, that it could deny firefighting services to senior citizens to "reduc[e] the exposure of the City's residents to protracted and costly [firefighting services]." App. 22a. Such a law would violate equal protection under any standard and could not survive. *See DeShaney v. Winnebago County Dep't of Social Services*, 489 U.S. 189, 196 n.3 (1989) (while due process does not require state to provide protective services, "[t]he State may not, of course, selectively deny its protective services to certain disfavored minorities without violating the Equal Protection Clause").[13]

Issue 3's ban on protections only for gay citizens is "inexplicable by anything but animus toward the class that it affects [and] lacks a rational relationship to legitimate state interests." *Romer*, 116 S.Ct. at 1627. The Court should review the decision below because it sends the message -- to Ypsilanti and elsewhere -- that group-based bans on the provision of government protection are constitutionally defensible.

III. THE RULING BELOW CONFLICTS WITH *ROMER*, *CLEBURNE* AND OTHER DECISIONS IN HOLDING THAT THE EQUAL PROTECTION CLAUSE DEMANDS LESS OF CITIES THAN STATES.

The court below placed controlling significance on the fact that Issue 3 is a citywide measure that was initiated and adopted at the local level. The Sixth Circuit held that as "a direct expression of the local community will on a subject of direct consequence to the voters" Issue 3 is distinct from Amendment 2, "carries a formidable presumption of legitimacy and is thus

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[13] *See also Stemler v. City of Florence*, 126 F.3d 856 (6th Cir. 1997), *petition for cert. filed*, No. 97-1376 (Feb. 11, 1998) (applying *Romer* to hold that municipal police officers violated plaintiff's equal protection rights); *Nabozny v. Podlesny*, 92 F.3d 446 (7th Cir. 1996) (no conceivable rational basis for school district's provision of less protection from harassment to gay student than to other students).

entitled to the highest degree of deference from the courts." App. 15a. This purported distinction between the statewide Colorado Amendment and Cincinnati's Issue 3 threatens to carve a gaping exception in equal protection mandates. The Sixth Circuit ignored the similarity of the two amendments and this Court's well-settled determination that all governmental entities must comply with equal protection guarantees. To the contrary, the lower court "underscore[d] that the constitutional concerns which anchor *Romer* are not implicated when previously adopted special legal protection at the local level is rescinded and its reinstatement precluded." App. 16a n.17. In short, the court below erroneously concluded that, notwithstanding *Romer*, cities remain free to do what the Equal Protection Clause forbids of states: To ban passage or enforcement of measures that would protect gay people from discrimination.

The only authorities cited for this proposition discuss the importance of the referendum and initiative process. App. 15a-16a. Given that Amendment 2 also was an initiated measure, these authorities cannot distinguish the Colorado and Cincinnati laws. To the extent the court below suggests that enactment by local initiative insulates Issue 3 from the scrutiny given Amendment 2, that determination squarely conflicts with the Court's rulings. *See, e.g., Cleburne*, 473 U.S. at 448 ("It is plain that the electorate as a whole, whether by referendum or otherwise, could not order city action violative of the Equal Protection Clause."); *Lucas v. Forty-Fourth General Assembly of Colorado*, 337 U.S. 713, 736-37 (1964) ("A citizen's constitutional rights can hardly be infringed simply because a majority of the people choose that it be.").

For gay residents of Cincinnati, the Issue 3 charter amendment is as much an obstacle to obtaining protection from their City government as Amendment 2 threatened to be for citizens of Colorado. The Court recognized in *Romer* that state and local governments have enacted civil rights laws and ordinances in response to the insufficient protections of common law. *Romer*, 116 S.Ct. at 1625. Municipalities often have been in the lead in identifying and enumerating traits that have unjustly been the basis for discrimination. Across the country, gay people

rely on more than 150 city and county laws and relatively few state laws for protection against sexual orientation discrimination. William N. Eskridge, Jr. and Nan D. Hunter, *Sexuality, Gender, and the Law*, 949 (1997). Demonstrating the significance of these local laws in securing equality among our citizens, the Court deemed it a "severe consequence" that Amendment 2 would have barred gay people from the embrace of public accommodations laws in Aspen, Boulder and Denver. *Romer*, 116 S.Ct. at 1626. Issue 3 imposes this same harm on gay, lesbian and bisexual Cincinnatians, as well as many other serious, adverse consequences.

The Sixth Circuit's suggestion that Issue 3's citywide scope meant it did not have a sufficiently catastrophic impact on the rights of gay people to violate the Equal Protection Clause minimizes the harms at stake and misconstrues *Romer*. The Court in *Romer* described the Colorado amendment's statewide sweep but did not hinge its ruling on the geographical reach of Amendment 2. The Court's holdings applied to "government and each of its parts." *Romer*, 116 S.Ct. at 1628. Nowhere did the Court suggest that a denial of equal access to government protection can stand if the government at issue is a city.

Likewise, nothing in *Romer* suggests laws like Issue 3 or Amendment 2 may be upheld as long as some avenues of reversal or preemption remain open. It would be a novel understanding of constitutional law to hold that the Fourteenth Amendment reached only laws and policies that are incapable of revision. Certainly Amendment 2, which could have been undone by state constitutional amendment or federal action, was not thereby validated. Such onerous options do not provide a ground to escape the core holding in *Romer* that a law may not make it more difficult for one group of citizens to obtain protection from government.

In the end, nothing in *Romer* or other precedents of this Court supports the remarkable contention that cities are not "constitutionally cognizable political sovereignties," App. 127a, or that application of equal protection principles depends on the level of government at which the challenged action takes place. *See, e.g., Avery v. Midland Cty.*, 390 U.S. 474, 479 (1968) ("The

Equal Protection Clause reaches the exercise of state power however manifested, whether exercised directly or through subdivisions of the State. . . . The actions of local government are the actions of the State."); *see also Board of Estimate of New York v. Morris*, 489 U.S. 688 (1989) (invalidating under Equal Protection Clause municipal electoral districts created in city charter); *United Bldg. & Constr. Trades Council of Camden Cty. v. Mayor & Council of Camden*, 465 U.S. 208, 215 (1984) ("[A] municipality is merely a political subdivision of the State from which its authority derives. . . . [W]hat would be unconstitutional [under the Equal Protection Clause] if done directly by the State can no more readily be accomplished by a city deriving its authority from the State."). *Cf. Bogan v. Scott-Harris*, ___ U.S. ___, 118 S.Ct. 966 (1998) (local legislators are entitled to same immunity as state legislators). As the dissenters from denial of rehearing observed, "the fact that Issue Three is a local as opposed to a state measure is of no controlling significance for purposes of the Equal Protection Clause." App. 133a (citing *Cleburne*, 473 U.S. 482). Indeed, the dangers of enacting an animus-based measure may be exacerbated in smaller political jurisdictions. *See The Federalist*, No. 10, at 77 (J. Madison) (C. Rossiter ed. 1961); *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 523 (1989) (Scalia, J., concurring) ("An acute awareness of the heightened danger of oppression from political factions in small, rather than large, political units dates to the very beginning of our national history."). The court below did not follow these well-settled principles or the holdings of this Court in *Romer*. To avoid the damaging effect of the lower court's actions, this case should be accepted for review and the decision of the Sixth Circuit reversed.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be granted and the judgment below summarily reversed, or, alternatively, subjected to plenary review.

Respectfully submitted,

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May 4, 1998

APPENDIX

EQUALITY FOUNDATION OF GREATER CINCINNATI, INC.; Richard Buchanan; Chad Bush; Edwin Greene; Rita Mathis; Roger Asterino; H.O.M.E., Inc.,

Plaintiffs-Appellees,

v.

CITY OF CINCINNATI (94-3973/4280), Defendant-Appellant,

Equal Rights, Not Special Rights; Mark Miller; Thomas E. Brinkman, Jr.;

Albert Moore (94-3855), Intervening Defendants-Appellants.

Nos. 94-3855, 94-3973 and 94-4280.

United States Court of Appeals,
Sixth Circuit.

Argued March 19, 1997.
Decided Oct. 23, 1997.

Before: KENNEDY, KRUPANSKY, and NORRIS, Circuit Judges.

KRUPANSKY, Circuit Judge.

This court previously disposed of this cause in *Equality Foundation of Greater Cincinnati, Inc. v. City of Cincinnati ("Equality Foundation I")*, 54 F.3d 261 (6th Cir. 1995), *vacated*, ---- U.S. ----, 116 S.Ct. 2519, 135 L.Ed.2d 1044 (1996). It has been remanded for reconsideration by the United States Supreme Court consequent to its decision in *Romer v. Evans*, 517 U.S. 620, 116 S.Ct. 1620, 134 L.Ed.2d 855 (1996).

In case numbers 94-3855/3973, defendant/appellant the City of Cincinnati ("the City"), and intervening

defendants/appellants Equal Rights Not Special Rights ("ERNSR"), Mark Miller, Thomas E. Brinkman, Jr., and Albert Moore (collectively denominated "the defendants"), challenged the lower court's invalidation of an amendment to the City Charter of Cincinnati ("the Charter") for purported constitutional infirmities, and its permanent injunction restraining implementation of that measure. As a result of an initiative petition, the subject amendment had appeared on the November 2, 1993 local ballot as "Issue 3" and was enacted by 62% of the ballots cast, thereby becoming Article XII of the Charter (hereinafter "the Cincinnati Charter Amendment" or "Article XII"). Article XII read:

> *NO SPECIAL CLASS STATUS MAY BE GRANTED BASED UPON SEXUAL ORIENTATION, CONDUCT OR RELATIONSHIPS.*
>
> The City of Cincinnati and its various Boards and Commissions may not enact, adopt, enforce or administer any ordinance, regulation, rule or policy which provides that homosexual, lesbian, or bisexual orientation, status, conduct, or relationship constitutes, entitles, or otherwise provides a person with the basis to have any claim of minority or protected status, quota preference or other preferential treatment. This provision of the City Charter shall in all respects be self-executing. Any ordinance, regulation, rule or policy enacted before this amendment is adopted that violates the foregoing prohibition shall be null and void and of no force or effect.

Defendant ERNSR had drafted and initiated Issue 3 in response to the prior adoption by the Cincinnati City Council ("Council") of two city ordinances. On March 13, 1991, Council enacted Ordinance No. 79-1991, commonly known as the "Equal Employment Opportunity Ordinance," which mandated that the City could not discriminate in its own hiring practices on the basis of

> classification factors such as race, color, sex, handicap, religion, national or ethnic origin, age, *sexual orientation*, HIV status, Appalachian regional ancestry, and marital status.

(Emphasis added).

Subsequently, Council on November 25, 1992 adopted Ordinance No. 490-1992 (commonly referred to as the "Human Rights Ordinance") which prohibited private discrimination in employment, housing, or public accommodation for reasons of sexual orientation. The opening paragraph of the Human Rights Ordinance expressed the intent of this legislation as:

> PROHIBITING unlawful discriminatory practices in the City of Cincinnati based on race, gender, age, color, religion, disability status, *sexual orientation*, marital status, or ethnic, national or Appalachian regional origin, in *employment*, *housing*, and *public accommodations* by ordaining Chapter 914, Cincinnati Municipal Code.

(Emphases added). The new law created a complaint and hearing procedure for seeking redress from purported sexual orientation discrimination, and exposed offenders to civil and criminal penalties.

In case number 94-4280, the City contested the district court's award of attorneys' fees and costs in favor of the plaintiffs/appellees Equality Foundation of Greater Cincinnati, Inc., Housing Opportunities Made Equal, Inc., Richard Buchanan, Chad Bush, Edwin Greene, Rita Mathis, and Roger Asterino (collectively designated "the plaintiffs") as the prevailing parties.

On May 12, 1995, this reviewing court reversed the lower court's judgment, vacated its injunction, and vacated its award of costs and attorneys' fees to the plaintiffs, concluding that the Cincinnati Charter Amendment offended neither the First nor the Fourteenth Amendments to the United States Constitution and accordingly could stand as enacted by the Cincinnati voters. *Equality Foundation I*, 54 F.3d 261 (6th Cir. 1995). Applying the

Supreme Court's longstanding, traditional tripartite equal protection analysis, *see, e.g., City of Cleburne v. Cleburne Living Center*, 473 U.S. 432, 440, 105 S.Ct. 3249, 3254-55, 87 L.Ed.2d 313 (1985), [1] this court initially considered if the newly enacted Cincinnati Charter Amendment uniquely disabled any "suspect class" or "quasi-suspect class," or invaded any person's "fundamental right(s)." In so doing, it resolved that, under *Bowers v. Hardwick*, 478 U.S. 186, 106 S.Ct. 2841, 92 L.Ed.2d

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[1] Where a statute or ordinance uniquely and adversely impacts a "suspect class" such as one defined by race, alienage, or national origin, or invades a "fundamental right" such as speech or religious freedom, the rigorous "strict scrutiny" standard governs, whereby such laws "will be sustained only if they are suitably tailored to serve a compelling state interest." *City of Cleburne v. Cleburne Living Center*, 473 U.S. 432, 440, 105 S.Ct. 3249, 3254, 87 L.Ed.2d 313 (1985). Where legislation singularly and negatively affects a "quasi-suspect" class (*i.e.* one defined by gender or illegitimacy), a somewhat less stringent evaluative norm (sometimes called "intermediate scrutiny") controls whereby such a legislative classification is deemed valid if it is "substantially related to a sufficiently important governmental interest" (gender classifications) or is "substantially related to a legitimate state interest" (illegitimacy classifications). *Id.* at 440-41, 105 S.Ct. at 3254-55. However, an ordinary enactment, such as the local initiative in the instant case, which does not impair the interests of members of any suspect or quasi-suspect class, and does not inordinately burden the plaintiffs' exercise of any fundamental constitutional right, is tested under the least demanding equal protection standard, the "rational relationship" inquiry. Under this deferential evaluation, "legislation is presumed to be valid and will be sustained if the classification drawn by the statute is rationally related to a legitimate state interest." *Id.* at 440, 105 S.Ct. at 3254. "When social or economic legislation is at issue, the Equal Protection Clause allows the States wide latitude, and the Constitution presumes that even improvident decisions will eventually be rectified by the democratic processes." *Id.* at 440, 105 S.Ct. at 3254 (citations omitted). *See also 37712, Inc. v. Ohio Dept. of Liquor Control*, 113 F.3d 614, 621-22 (6th Cir. 1997).

140 (1986) (directing that homosexuals possessed no fundamental substantive due process right to engage in homosexual conduct or constitutional protection against criminalization of that activity) and its progeny,[2] homosexuals did not constitute either a "suspect class" or a "quasi-suspect class" because the conduct which defined them as homosexuals was constitutionally proscribable. *Equality Foundation I,* 54 F.3d at 266-67 & n. 2. This court further observed that any attempted identification of homosexuals by non-behavioral attributes could have no meaning, because the law could not successfully categorize persons "by subjective and unapparent characteristics such as innate desires, drives, and thoughts." *Id.* at 267. Additionally, this court denied the

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[2] *See Steffan v. Perry*, 41 F.3d 677, 684 n. 3 (D.C.Cir. 1994) (en banc) (following *Padula v. Webster*, 822 F.2d 97, 103 (D.C.Cir. 1987) ("It would be quite anomalous, on its face, to declare status defined by conduct that states may constitutionally criminalize as deserving of strict scrutiny under the equal protection clause")); *Ben-Shalom v. Marsh*, 881 F.2d 454, 464 (7th Cir. 1989), *cert. denied*, 494 U.S. 1004, 110 S.Ct. 1296, 108 L.Ed.2d 473 (1990) ("If homosexual conduct may constitutionally be criminalized, then homosexuals do not constitute a suspect or quasi-suspect class entitled to greater than rational basis scrutiny for equal protection purposes"); *High Tech Gays v. Defense Industrial Security Clearance Office*, 895 F.2d 563, 571 (9th Cir. 1990) (same); *Woodward v. United States*, 871 F.2d 1068, 1076 (Fed.Cir. 1989), *cert. denied*, 494 U.S. 1003, 110 S.Ct. 1295, 108 L.Ed.2d 473 (1990) (explaining that homosexuality is primarily behavioral in nature and as such is not immutable; "[a]fter *Hardwick* it cannot logically be asserted that discrimination against homosexuals is constitutionally infirm").

Accord Baker v. Wade, 769 F.2d 289, 292 (5th Cir. 1985) (en banc), *cert. denied*, 478 U.S. 1022, 106 S.Ct. 3337, 92 L.Ed.2d 742 (1986) (pronouncing that homosexuals compose neither a suspect nor a quasi-suspect class); *National Gay Task Force v. Board of Education of Oklahoma City*, 729 F.2d 1270, 1273 (10th Cir. 1984), *aff'd mem. by an equally divided Court*, 470 U.S. 903, 105 S.Ct. 1858, 84 L.Ed.2d 776 (1985) (resolving that the legal classification of gays is not suspect) (both decided prior to *Bowers*).

existence of any all-inclusive fundamental constitutional right to "participate fully in the political process" which could be impaired by the Cincinnati Charter Amendment, [3] and rejected the claim that the provision infringed anyone's fundamental First Amendment right to speak or associate freely, or to petition the government for redress of grievances. *Id.* at 268-70.

Accordingly, because the Cincinnati Charter Amendment targeted no suspect class or quasi-suspect class, and divested no one of any fundamental right, it was not subject to either form of heightened constitutional scrutiny (namely "strict scrutiny" or "intermediate scrutiny"). *See Cleburne*, 473 U.S. at 439-41, 105 S.Ct. at 3253-55. Rather, it should have been assessed under the most common and least rigorous equal protection norm (the "rational relationship" test), which directed that challenged legislation must stand if it rationally furthers any conceivable legitimate governmental interest.[4] *Heller v. Doe by Doe*, 509

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[3] By contrast, the district court had accepted the plaintiffs' argument that such a fundamental right emanated from the Constitution and that Article XII deprived Cincinnati gays of the exercise of that purported right. *See Equality Foundation I*, 54 F.3d at 268 (*citing Equality Foundation of Greater Cincinnati, Inc. v. City of Cincinnati*, 860 F.Supp. 417, 430-34 (S.D.Ohio 1994)).

[4] The party challenging the rationality of legislation bears the burden of negating every conceivable basis for that enactment, regardless of whether or not such supporting rationale was cited by, or actually relied upon by, the promulgating authority. *Federal Communications Commission v. Beach Communications, Inc.*, 508 U.S. 307, 313-15, 113 S.Ct. 2096, 2100- 02, 124 L.Ed.2d 211 (1993). "The burden upon a party seeking to overturn a legislative enactment for irrationally discriminating between groups under the equal protection clause is an extremely heavy one." *Borman's, Inc. v. Michigan Prop. & Cas. Guar. Ass'n*, 925 F.2d 160, 162 (6th Cir.), *cert. denied*, 502 U.S. 823, 112 S.Ct. 85, 116 L.Ed.2d 58 (1991).

Indeed, a reviewing court in this circuit may not even inquire into

U.S. 312, 319-21, 113 S.Ct. 2637, 2642-43, 125 L.Ed.2d 257 (1993); *Federal Communications Commission v. Beach Communications, Inc.*, 508 U.S. 307, 313-15, 113 S.Ct. 2096, 2100-02, 124 L.Ed.2d 211 (1993); *Cleburne, supra*; *see Equality Foundation I*, 54 F.3d at 270. In *Equality Foundation I*, this court observed that the Cincinnati Charter Amendment advanced a variety of valid community interests, including enhanced associational liberty for its citizenry, conservation of public resources, and augmentation of individual autonomy imbedded in personal conscience and morality. Thus, Article XII satisfied minimal constitutional requirements. *Equality Foundation I*, 54 F.3d at 270-71. Finally, this court rejected, on standing and mootness rationales, the plaintiffs' contention that the Cincinnati Charter Amendment was void for unconstitutional vagueness. *Id.* at 271.

On May 20, 1996, the United States Supreme Court decided *Romer v. Evans*, 517 U.S. 620, 116 S.Ct. 1620, 134 L.Ed.2d 855 (1996). In that decision, the Court invalidated an amendment to the Colorado constitution ("Colorado Amendment 2") enacted by a statewide plebiscite as an infringement of the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution. Colorado Amendment 2 recited:

> No Protected Status Based on Homosexual, Lesbian, or Bisexual Orientation. Neither the State of Colorado, through any of its branches or departments, nor any of its agencies, political subdivisions, municipalities or school districts, shall enact, adopt or enforce any statute, regulation, ordinance or policy whereby homosexual, lesbian or bisexual orientation, conduct, practices or

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the electorate's possible actual motivations for adopting a measure via initiative or referendum. Instead, the court must consider all hypothetical justifications which potentially support the enactment. *Arthur v. City of Toledo*, 782 F.2d 565, 574 (6th Cir. 1986); *Clarke v. City of Cincinnati, 40 F.*3d 807, 815 (6th Cir. 1994), *cert. denied*, 514 U.S. 1109, 115 S.Ct. 1960, 131 L.Ed.2d 851 (1995).

> relationships shall constitute or otherwise be the basis of or entitle any person or class of persons to have or claim any minority status, quota preferences, protected status or claim of discrimination. This Section of the Constitution shall be in all respects self-executing.

Id. at ----, 116 S.Ct. at 1623.

Although the United States Supreme Court in *Romer* affirmed the Colorado Supreme Court's decision striking down Colorado Amendment 2, it rejected the reasoning of that court which had posited the existence of a fundamental constitutional right to participate in the political process and then concluded that, under "strict scrutiny" review, Colorado Amendment 2 deprived homosexuals in Colorado of that fundamental right. *Romer*, at ----, 116 S.Ct. at 1624 (*citing Evans v. Romer*, 854 P.2d 1270 (Colo.1993) and *Evans v. Romer*, 882 P.2d 1335 (Colo.1994)). By contrast, the United States Supreme Court did not assess Colorado Amendment 2 under "strict scrutiny" or "intermediate scrutiny" standards, but instead ultimately applied "rational relationship" strictures to that enactment and resolved that the Colorado state constitutional provision did not invade any fundamental right and did not target any suspect class or quasi-suspect class. *See Romer*, at ----, 116 S.Ct. at 1627. In so ruling, the Court, *inter alia*, (1) reconfirmed the traditional tripartite equal protection assessment of legislative measures;[5] and (2) resolved that the deferential "rational relationship" test, that declared the constitutional validity of a statute or ordinance if it rationally furthered any conceivable valid public interest, was the correct point of departure for the evaluation of laws which uniquely burdened the interests of homosexuals.

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[5] *See Valot v. Southeast Local School Dist. Bd. of Educ.*, 107 F.3d 1220, 1229 (6th Cir. 1997) (ruling that government regulations which do not classify plaintiffs on suspect or quasi-suspect lines, nor impinge constitutionally protected personal rights, are reviewed for rationality) (*citing Romer*, at ----, 116 S.Ct. at 1627), *petition for cert. filed*, 66 U.S.L.W. 3086 (July 10, 1997) (No. 97-74).

Nonetheless, the *Romer* Court invalidated Colorado Amendment 2 because it was deemed invidiously discriminatory and not rationally connected to the advancement of any legitimate state objective. *Romer*, at ----, ----, 116 S.Ct. at 1627, 1629. Subsequently, on June 17, 1996, the Supreme Court granted the plaintiffs' petition for a writ of certiorari in the case *sub judice*, vacated this court's judgment in *Equality Foundation I*, and remanded the cause to this forum "for further consideration in light of *Romer v. Evans*, 517 U.S. 620, 116 S.Ct. 1620, 134 L.Ed.2d 855 (1996)." *Equality Foundation of Greater Cincinnati v. City of Cincinnati*, ---- U.S. ----, 116 S.Ct. 2519, 135 L.Ed.2d 1044 (1996). Upon remand, this court ordered rebriefing by the parties and full rehearing (conducted on March 19, 1997).

Although this circuit, in *Equality Foundation I*, and the Supreme Court, in *Romer*, each applied "rational relationship" scrutiny to a popularly enacted measure which negatively impacted the interests of homosexuals, this court concluded that the Cincinnati Charter Amendment withstood a constitutional equal protection attack, whereas the Supreme Court resolved that Colorado Amendment 2 did not. An exacting comparative analysis of *Romer* with the facts and circumstances of this case disclose that these contrary results were reached because the two cases involved substantially different enactments of entirely distinct scope and impact, which conceptually and analytically distinguished the constitutional posture of the two measures. As developed herein, the salient operative factors which motivated the *Romer* analysis and result were unique to that case and were not implicated in *Equality Foundation I*.

The *Romer* Court, prior to undertaking the conventional "rational relationship" equal protection inquiry, initially characterized Colorado Amendment 2 as facially objectionable because it removed municipally legislated special legal protection from gays and precluded the relegislation of special legal rights for them at every level of state government:

> Amendment 2, in explicit terms, does more than repeal or rescind these provisions [city ordinances

banning gay discrimination in housing, public accommodations, employment, education, and health and welfare services]. It prohibits all legislative, executive or judicial action at any level of state or local government designed to protect the named class, a class we shall refer to as homosexual persons or gays and lesbians.

Romer, at ----, 116 S.Ct. at 1623. The Court elaborated:

> Sweeping and comprehensive is the change in legal status effected by this law.... Homosexuals, by state decree, are put in a solitary class with respect to transactions and relations in both the private and the governmental spheres. The amendment withdraws from homosexuals, but no others, specific legal protection from the injuries caused by discrimination, and it forbids reinstatement of these laws and policies.

Id. at ----, 116 S.Ct. at 1625.

The majority concluded:

> In any event, even if, as we doubt, homosexuals could find some safe harbor in laws of general application, we cannot accept the view that Amendment 2's prohibition on specific legal protections does no more than deprive homosexuals of special rights. To the contrary, the amendment imposes a special disability upon those persons alone. Homosexuals are forbidden the safeguards that others enjoy or may seek without constraint. They can obtain specific protection against discrimination only by enlisting the citizenry of Colorado to amend the state constitution or perhaps, on [sic] the State's view, by trying to pass helpful laws of general applicability. This is so no matter how local or discrete the harm, no matter how public or widespread the injury. We find nothing special in the protections Amendment 2 withholds. These are protections taken for granted by most people either because they already have them or do not need them; these are protections against exclusion from an almost

> limitless number of transactions and endeavors that constitute ordinary civic life in a free society.

Id. at ----, 116 S.Ct. at 1626-27.

The Court additionally observed that Colorado Amendment 2 could be read to divest homosexuals of all state law government protection available to all other citizens:

> Amendment 2's reach may not be limited to specific laws passed for the benefit of gays and lesbians. It is a fair, if not necessary, inference from the broad language of the amendment that it deprives gays and lesbians even of the protection of general laws and policies that prohibit arbitrary discrimination in governmental and private settings.

Romer, at ----, 116 S.Ct. at 1626. However, the *Romer* Court did not rely upon that potential universally exclusive effect to invalidate the measure, but instead ultimately construed Colorado Amendment 2 only to remove and prohibit special legal rights for homosexuals under state law:

> If this consequence [withdrawal of all state law rights from homosexuals] follows from Amendment 2, as its broad language suggests, it would compound the constitutional difficulties the law creates. The state court did not decide whether the amendment had this effect, however, and neither do we.[6]

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[6] Concordantly, the three dissenting Justices accepted the majority rationale that Colorado Amendment 2 did not divest homosexuals of the rights and protections available to other Coloradans under state laws of general application, and observed that it merely erected a barrier to the enactment of special legal rights for gay Coloradans at all levels of state law:

> [T]he Court's [majority] opinion ultimately does not dispute [that the amendment does not deprive gays of state law rights generally applicable to all other persons in Colorado], but assumed it to be true. See *ante*, at ----, 116 S.Ct. at 1626. The only denial of equal treatment it contends homosexuals have suffered is this: They may not obtain *preferential* treatment without amending the state

Id.

The more restricted reach of the Cincinnati Charter Amendment, as compared to the actual and potential sweep of Colorado Amendment 2, is noteworthy. Colorado's Amendment 2 provided:

> **No Protected Status** Based on Homosexual, Lesbian, or Bisexual Orientation. Neither the State of Colorado, through any of its branches or departments, nor any of its agencies, political subdivisions, municipalities or school districts, shall enact, adopt or enforce any statute, regulation, ordinance or policy whereby homosexual, lesbian or bisexual orientation, conduct, practices or relationships shall constitute or otherwise be the basis of or entitle any person or class of persons to have or claim **any** minority status, quota preferences, **protected status** or **claim of discrimination**. This Section of the Constitution shall be in all respects self-executing.

Romer, at ----, 116 S.Ct. at 1623 (boldface added). By contrast, Cincinnati's Article XII pronounced:

> ***NO SPECIAL CLASS STATUS*** *MAY BE GRANTED BASED UPON SEXUAL ORIENTATION, CONDUCT OR RELATIONSHIPS.*
>
> The City of Cincinnati and its various Boards and Commissions may not enact, adopt, enforce or administer any ordinance, regulation, rule or policy which provides that homosexual, lesbian, or bisexual orientation, status, conduct, or relationship constitutes, entitles, or otherwise provides a person with the basis to have any claim of minority or protected status, quota preference **or other preferential treatment**. This provision of the City Charter shall in all respects be self-executing. Any ordinance, regulation, rule or policy enacted before this amendment is adopted that violates the foregoing

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constitution.

Romer, at ----, 116 S.Ct. at 1630 (Scalia, J., dissenting) (emphasis in original).

> prohibition shall be null and void and of no force or effect.
>
> *Equality Foundation I*, 54 F.3d at 264 (boldface added).

Accordingly, the language of the Cincinnati Charter Amendment, read in its full context, merely prevented homosexuals, as homosexuals, from obtaining special privileges and preferences (such as affirmative action preferences or the legally sanctioned power to force employers, landlords, and merchants to transact business with them) from the City. In stark contrast, Colorado Amendment 2's far broader language could be construed to exclude homosexuals from the protection of every Colorado state law, including laws generally applicable to all other Coloradans, thus rendering gay people without recourse to any state authority at any level of government for any type of victimization or abuse which they might suffer by either private or public actors. *Romer*, at ---- - ----, 116 S.Ct. at 1625-27. Whereas Colorado Amendment 2 ominously threatened to reduce an entire segment of the state's population to the status of virtual non-citizens (or even non-persons) without legal rights under any and every type of state law,[7] the Cincinnati Charter Amendment had no such sweeping and conscience-shocking effect, because (1) it applied only at the lowest (municipal) level of government and thus could not dispossess gay Cincinnatians of any rights derived from any higher level of state law and enforced by a superior apparatus of state government, and (2) its narrow, restrictive language could not be construed to deprive homosexuals of all legal protections even under municipal law, but instead eliminated only "special class status" and "preferential

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[7] The *Romer* Court opined:

> We must conclude that Amendment 2 classifies homosexuals not to further a proper legislative end but to make them unequal to everyone else. This Colorado cannot do. A State cannot deem a class of persons a stranger to its laws.

Romer, at ----, 116 S.Ct. at 1629.

treatment" for gays as gays under Cincinnati ordinances and policies, leaving untouched the application, to gay citizens, of any and all legal rights generally accorded by the municipal government to all persons as persons.[8]

At bottom, the Supreme Court in *Romer* found that a state constitutional proviso which deprived a politically unpopular minority, but no others, of the political ability to obtain special legislation at every level of state government, including within local jurisdictions having pro-gay rights majorities, with the only possible recourse available through surmounting the formidable political obstacle of securing a rescinding amendment to the state constitution, was simply so obviously and fundamentally inequitable, arbitrary, and oppressive that it literally violated basic equal protection values. Thus, the Supreme Court directed that the ordinary three-part equal protection query was rendered irrelevant. *See Romer*, at ----, 116 S.Ct. at 1627 (noting that

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[8] The City was not constitutionally compelled to enact special privileges or protections for homosexuals because no person is constitutionally insulated from private discrimination, *Crawford v. Board of Education*, 458 U.S. 527, 538, 102 S.Ct. 3211, 3218, 73 L.Ed.2d 948 (1982); *Moose Lodge No. 107 v. Irvis*, 407 U.S. 163, 172, 92 S.Ct. 1965, 1971, 32 L.Ed.2d 627 (1972), and because public discrimination towards persons who are not members of a suspect or quasi-suspect class is permissible as long as such official discrimination is rationally linked to the furtherance of some valid public interest, *see Romer*, at ----, 116 S.Ct. at 1627. Nothing in *Romer* implied that the Colorado municipalities which had adopted gay rights ordinances could be constitutionally restrained from retracting such enactments through ordinary legislative processes. Indeed, the plaintiffs herein have conceded that the City and its voters at all times possessed the constitutional authority to rescind the gay rights ordinances. Accordingly, the Cincinnati City Charter's removal of previously enacted special rights for gays was constitutionally unassailable.

Colorado Amendment 2 "defies" conventional equal protection analysis).

This "extra-conventional" application of equal protection principles can have no pertinence to the case *sub judice*. The low level of government at which Article XII becomes operative is significant because the opponents of that strictly local enactment need not undertake the monumental political task of procuring an amendment to the Ohio Constitution as a precondition to achievement of a desired change in the local law, but instead may either seek local repeal of the subject amendment through ordinary municipal political processes, or pursue relief from every higher level of Ohio government including but not limited to Hamilton County, state agencies, the Ohio legislature, or the voters themselves via a statewide initiative.

Moreover, unlike Colorado Amendment 2, which interfered with the expression of local community preferences in that state, the Cincinnati Charter Amendment constituted a direct expression of the local community will on a subject of direct consequences to the voters. Patently, a local measure adopted by direct franchise, designed in part to preserve community values and character, which does not impinge upon any fundamental right or the interests of any suspect or quasi-suspect class, carries a formidable presumption of legitimacy and is thus entitled to the highest degree of deference from the courts. *Cf. Hunter v. Erickson*, 393 U.S. 385, 89 S.Ct. 557, 21 L.Ed.2d 616 (1969) (commanding that a municipal charter amendment adopted by initiative cannot stand if it facially discriminates along suspect lines of race, color, religion, and national origin); *James v. Valtierra*, 402 U.S. 137, 140-41, 91 S.Ct. 1331, 1333-34, 28 L.Ed.2d 678 (1971).

As the product of direct legislation by the people, a popularly enacted initiative or referendum occupies a special posture in this nation's constitutional tradition and jurisprudence. An expression of the popular will expressed by majority

plebiscite, especially at the lowest level of government (which is the level of government closest to the people), must not be cavalierly disregarded. *See, e.g., City of Eastlake v. Forest City Enterprises, Inc.*, 426 U.S. 668, 679, 96 S.Ct. 2358, 2364-65, 49 L.Ed.2d 132 (1976) (explaining that the referendum process is "a basic instrument of democratic government"); *James*, 402 U.S. at 141-43, 91 S.Ct. at 1333-34 (exalting the referendum as manifesting "devotion to democracy, not to bias, discrimination, or prejudice" and as constituting a "procedure [which] ensures that all the people of a community will have a voice in a decision ... that will affect the future development of their own community."); *accord Southern Alameda Spanish Speaking Organization v. Union City*, 424 F.2d 291, 294 (9th Cir. 1970) ("A referendum ... is far more than an expression of ambiguously founded neighborhood preference. It is the city itself legislating through its voters--an exercise by the voters of their traditional right through direct legislation to override the views of their elected representatives as to what serves the public interest.") (*citing Spaulding v. Blair*, 403 F.2d 862, 863 (4th Cir. 1968) ("The referendum procedure ... is a fundamental part of the State's legislative process.")).[9]

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[9] This court underscores that the constitutional concerns which anchor *Romer* are not implicated when previously adopted special legal protection at the local level is rescinded, and its reinstatement precluded, irrespective of whether the prohibition is enacted by the voters directly, by the city's elected representatives, or by some other competent instrumentality such as a local department supervisor. Unlike a state government, which is composed of discrete and quasi-independent levels and entities such as cities, counties, and the general state government, a municipality is a unitary local political subdivision or unit comprised, fundamentally, of the territory and residents within its geographical boundaries. *See, e.g., Mumford v. Basinski*, 105 F.3d 264, 267-68 (6th Cir. 1997) (distinguishing Ohio municipalities and counties as creatures of state law constituting "bodies politic and corporate" from the state government and its arms, officers, and instrumentalities), *petition for cert. filed*, 66 U.S.L.W. 3137 (U.S. Aug. 4, 1997) (No. 97-243). The citizens of the City of Cincinnati have instituted a charter form of government whereby day to day management is delegated to an elected city council, which in turn delegates specific tasks to various departments and agents. But the citizenry as a whole remains the ultimate authority in this discrete political subdivision, and it can, by charter amendment, alter the authority and powers it delegated to its council. No logically sound construction of the components of a municipal polity could compartmentalize the City's citizens, elected representatives, and administrative departments into conceptually separate levels of local government, in the way that municipalities and other local entities are distinct levels of state government as compared to the state entity itself. Hence, it would be irrational to argue that the adoption of a gay rights regulation by a municipal department could not constitutionally be eliminated, and its reintroduction barred, by the city council or the city's voters, on the theory that it would be more difficult for proponents of gay rights to lobby the city council or the city's electorate than to lobby the pertinent department chief, because the city's voters, elected council, and departments and employees are all components, with varying degrees and spheres of authority, of the same (municipal) level of state government. Stated differently, it would be illogical to conclude that city council would be powerless to void a rule or regulation promulgated by one of the city's departments or department heads on the theory that it would be more difficult to lobby council for a change than the department administrators.

In any event, *Romer* should not be construed to forbid local electorates the authority, via initiative, to instruct their elected city council representatives, or their elected or appointed municipal officers, to withhold special rights, privileges, and protections from homosexuals, or to prospectively remove the authority of such public representatives and officers to accord special rights, privileges, and protections to any non-suspect and non-quasi-suspect group. Such a reading would disenfranchise the voters of their most fundamental right which is the very foundation of the democratic form of government, even through the lowest (and most populist) organs and avenues of state government, to vote to override or preempt any policy or practice implemented or contemplated by their subordinate civil servants

to bestow special rights, protections, and/or privileges upon a group of people who do not comprise a suspect or a quasi-suspect class and hence are not constitutionally entitled to any special favorable legal status. *Romer* dealt with a statewide constitutional amendment that denied homosexuals access to every level and instrumentality of state government as possible sources of special legal protection. *Romer* supplied no rationale for subjecting a purely local measure of modest scope, which simply refused special privileges under local law for a non-suspect and non-quasi-suspect group of citizens, to any equal protection assessment other than the traditional "rational relationship" test.

The *Romer* Court, after concluding that the sweeping effect of Colorado Amendment 2 literally offended basic equal protection standards without the necessity of performing the traditional three-tiered equal protection analysis, then mandated that, even under traditional equal protection strictures, Colorado Amendment 2 could not survive "rational relationship" review:

> Amendment 2 fails, indeed defies, even this conventional inquiry. First, the amendment has the peculiar property of imposing a broad and undifferentiated disability on a single named group, an exceptional and, as we shall explain, invalid form of legislation. Second, its sheer breadth is so discontinuous with the reasons offered for it that the amendment seems inexplicable by anything but animus toward the class that it affects; it lacks a rational relationship to legitimate state interests.
>
> ....
>
> In the ordinary case, a law will be sustained if it can be said to advance a legitimate government interest, even if the law seems unwise or works to the disadvantage of a particular group, or if the rationale for it seems tenuous.... By requiring that the classifications bear a rational relationship to an independent and legitimate legislative end, we ensure that classifications are not drawn for the purpose of disadvantaging the group burdened by the law.

> Amendment 2 confounds this normal process of judicial review. It is at once too narrow and too broad. It identifies persons by a single trait and then denies them protection across the board. The resulting disqualification of a class of persons from the right to seek specific protection for the law is unprecedented in our jurisprudence.

Id. at ---- - ----, 116 S.Ct. at 1627-28 (citations omitted).

Accordingly, the *Romer* majority's rejection of rational relationship assessment hinged upon the wide breadth of Colorado Amendment 2, which deprived a politically unpopular minority of the opportunity to secure special rights at every level of state law. The uniqueness of Colorado Amendment 2's sweeping scope and effect differentiated it from the "ordinary case" in which a law adversely affects a discernable group in a relatively discrete manner and limited degree. In this context, the Court found that the rationales proffered by the state in support of Colorado Amendment 2 could not be justified, because the scope and effect of Colorado Amendment 2 "raise the inevitable inference that the disadvantage imposed is born of animosity toward the class of persons affected." *Id.* at ----, 116 S.Ct. at 1628. Therefore, the *Romer* Court rejected the state's argument that Colorado Amendment 2, as drafted, rationally advanced its legitimate public interests in furthering "respect for other citizens' freedom of association, and in particular of landlords or employers who have personal or religious objections to homosexuality" and "conserving resources to fight discrimination against other groups." *Id.* at ----, 116 S.Ct. at 1629. The Court found:

> The breadth of the Amendment is so far removed from these particular justifications that we find it impossible to credit them. We cannot say that Amendment 2 is directed

> to any identifiable legitimate purpose or discrete objective.[10]

Id.

In essence, the high Court resolved that a state constitutional amendment which denied homosexuals any opportunity to attain state law protection, even from municipalities or other local entities within that state which desired to accord them special legal rights, could not be justified by the proffered public interests purportedly advanced by that state enactment, namely enhancement of the associational liberty of the state's residents and the conservation of public resources, because the citizens of the affected subordinate bodies politic had elected, or otherwise would elect, to forgo those identified public interests in favor of guaranteeing, through local governmental instrumentalities, nondiscriminatory treatment of the gay citizens of their local governmental units.

A state law which prevents local voters or their representatives, against their will, from granting special rights to gays, cannot be rationally justified by cost savings and associational liberties which the majority of citizens in those communities do not want. Clearly, the financial interests and associational liberties of the citizens of the state as a whole are not implicated if a municipality creates special legal protections for homosexuals applicable only within that jurisdiction and implements those protections solely via local governmental apparatuses. For this reason, the justifications proffered by Colorado for Colorado Amendment 2 insufficiently supported that provision, and implied that no reason other than a bare desire to harm homosexuals, rather than to advance the individual and

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[10] *See also id.* at ---- - ----, 116 S.Ct. at 1628-29 (noting that by removing all access to special state legal protection from gays, Colorado Amendment 2 "inflicts on them immediate, continuing, and real injuries that outrun and belie any legitimate justifications that may be claimed for it").

collective interests of the majority of Colorado's citizens, motivated the state's voters to adopt Colorado Amendment 2.[11]

In contradistinction, as evolved herein, the Cincinnati Charter Amendment constituted local legislation of purely local scope. As such, the City's voters had clear, actual, and direct individual and collective interests in that measure, and in the potential cost savings and other contingent benefits which could result from that local law. Beyond contradiction, passage of the Cincinnati Charter Amendment was not facially animated solely by an impermissible naked desire of a majority of the City's residents to injure an unpopular group of citizens, rather than to legally actualize their individual and collective interests and preferences. Clearly, the Cincinnati Charter Amendment implicated at least one issue of direct, actual, and practical importance to those who voted it into law, namely whether those voters would be legally compelled by municipal ordinances to expend their own public and private resources to guarantee and enforce nondiscrimination against gays in local commercial transactions and social intercourse.

Unquestionably, the Cincinnati Charter Amendment's removal of homosexuals from the ranks of persons protected by municipal antidiscrimination ordinances, and its preclusion of restoring that group to protected status, would eliminate and forestall the substantial public costs that accrue from the

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[11] The *Romer* Court opined that, because Colorado Amendment 2 prevented even localities solicitous of homosexual rights from enacting legal assistance for homosexuals, the true objective of that measure was to maliciously injure homosexuals rather than to advance a proper interest of a majority of the state's voters:

> We must conclude that Amendment 2 classifies homosexuals not to further a proper legislative end but to make them unequal to everyone else. This Colorado cannot do. A State cannot deem a class of persons a stranger to its laws.

Romer, at ----, 116 S.Ct. at 1629.

investigation and adjudication of sexual orientation discrimination complaints, which costs the City alone would otherwise bear because no coextensive protection exists under federal or state law. Moreover, the elimination of actionable special rights extended by city ordinances, and prevention of the reinstatement of such ordinances, would effectively advance the legitimate governmental interest of reducing the exposure of the City's residents to protracted and costly litigation by eliminating a municipally-created class of legal claims and charges, thus necessarily saving the City and its citizens, including property owners and employers, the costs of defending against such actions.[12] Although the *Romer* Court never rejected associational liberty and the expression of community moral disapproval of homosexuality as rational bases supporting an enactment denying privileged treatment to homosexuals, it concluded that under the facts and circumstances of *Romer*, the state's argument in support of Colorado Amendment 2 was not credible. Because the valid interests of the Cincinnati electorate in conserving public and private financial resources is, standing alone, of sufficient weight to justify the City's Charter Amendment under a rational basis analysis, discussion of equally justifiable community interests, including the application of associational liberty and community

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[12] Indeed, the United States Senate last year considered legislation crafted to eliminate sexual orientation discrimination in employment, but rejected that proposal largely to avoid promotion of a "litigation bonanza." 142 Cong. Rec. S9992 (daily ed. Sept. 6, 1996) (statement of Sen. Hatch) (commenting on Employment Nondiscrimination Act of 1995, S.2056, 104th Cong.). *See also id.* at S10004 ("The bill virtually guarantees an avalanche of costly litigation which could hurt small businesses most of all.") (statement of Sen. Coverdell); *id.* at S9997 ("A lot of individuals and a lot of firms would be sued based on sexual orientation claims if this bill becomes law.") (statement of Sen. Nickles); *id.* at S9989 ("I do not believe ... that we will promote greater tolerance in the workplace by relying on more lawsuits as this bill would require.") (statement of Sen. Kassebaum).

moral disapproval of homosexuality, is unnecessary to sustain the Charter Amendment's viability.[13]

In summary, the Cincinnati Charter Amendment did not disempower a group of citizens from attaining special protection at all levels of state government, but instead merely removed municipally enacted special protection from gays and lesbians. Unlike Colorado Amendment 2, the Cincinnati Charter Amendment cannot be characterized as an irrational measure fashioned only to harm an unpopular segment of the population in a sweeping and unjustifiable manner.

Accordingly, the judgment below is hereby **REVERSED**, and the district court's permanent injunction against implementation and enforcement of the Cincinnati Charter Amendment (Article XII) is hereby **VACATED**. The lower court's award of costs (including attorneys' fees) to the plaintiffs is also **VACATED**. This case is hereby **REMANDED** to the district court for entry of judgment in favor of the defendants, and for such further necessary and appropriate proceedings and orders as are consistent with this decision.

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[13] Although Cincinnati's interest in conserving public and private resources might have been served by a mere repeal of the sexual orientation clauses of the Human Rights Ordinance and Equal Employment Opportunity Ordinance, we do not think it irrational for Cincinnati to advance this interest by means of a charter amendment. Cincinnati voters may have doubted that the city council would exercise the fiscal restraint the voters themselves valued, and they may, therefore, have feared that the Council would respond to a simple repeal by reenacting the two sexual orientation clauses. We conclude that the voters of Cincinnati were within their constitutional rights to declare that, henceforth, they alone would decide whether the benefits of protecting gays and lesbians from discrimination outweighs the costs.

SUPREME COURT OF THE UNITED STATES

EQUALITY FOUNDATION OF GREATER CINCINNATI, INC., ET AL. *v.* CITY OF CINCINNATI ET AL.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

No. 95-239. Decided June 17, 1996

The petition for a writ of certiorari is granted. The judgment is vacated and the case is remanded to the United States Court of Appeals for the Sixth Circuit for further consideration in light of *Romer v. Evans*, 517 U.S. __ (1996).

JUSTICE SCALIA, with whom THE CHIEF JUSTICE and JUSTICE THOMAS join, dissenting.

I dissent from the decision to remand this case in light of *Romer v. Evans*, 517 U.S. __ (1996). *Romer* involved a state constitutional amendment prohibiting special protection for homosexuals. The consequence of its holding is that homosexuals in a city (or other electoral subunit) that *wishes* to accord them special protection cannot be compelled to achieve a state constitutional amendment in order to have the benefit of that democratic preference. The present case, by contrast, involves a determination by what appears to be the lowest electoral subunit that it does *not* wish to accord homosexuals special protection. It can make that determination effective, of course, only by instructing its departments and agencies to obey it — which is what the Cincinnati Charter Amendment does. Thus, the consequence of holding *this* provision unconstitutional would be that nowhere in the country may the people decide, in democratic fashion, not to accord special protection to homosexuals. Unelected heads of city departments and agencies, who are in other respects (as democratic theory requires) subject to the

control of the people, must, where special protection for homosexuals are concerned, be permitted to do what they please. This is such an absurd proposition that *Romer*, which did not involve the issue, cannot possibly be thought to have embraced it.

I would deny certiorari in this case, or else set the case for argument to decide for ourselves the *ultra-Romer* issue that it presents.

RECOMMENDED FOR FULL-TEXT PUBLICATION
Pursuant to Sixth Circuit Rule 24

ELECTRONIC CITATION: 1995 FED App. 0147P (6th Cir.)
File Name: 95aO147p.06
NOS. 94-3855/3973/4280

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

EQUALITY FOUNDATION OF GREATER CINCINNATI, INC., RICHARD BUCHANAN, CHAD BUSH, EDWIN GREENE, RITA MATHIS, ROGER ASTERINO AND H.O.M.E., INC.,
Plaintiffs-Appellees,

v.

CITY OF CINCINNATI (94-3973/4280),
Defendant-Appellant,

EQUAL RIGHTS NOT SPECIAL RIGHTS, MARK MILLER, THOMAS E. BRINKMAN, JR., AND ALBERT MOORE (94-3855),
Intervening
Defendants-Appellants.

ON APPEAL from the United States District Court for the Southern District of Ohio

Decided and Filed May 12, 1995

Before: KENNEDY, KRUPANSKY, and NORRIS, Circuit Judges.

KRUPANSKY, Circuit Judge. In case numbers 94--3855/3973, defendant/appellant the City of Cincinnati ("the City"), and intervening defendants/appellants Equal Rights Not Special Rights ("ERNSR"), Mark Miller, Thomas E. Brinkman, Jr., and Albert Moore, challenged the lower court's invalidation of, and permanent injunction restraining implementation of, an amendment to the City Charter of Cincinnati ("the Charter") denominated "Issue 3" which was enacted by popular vote on November 2, 1993 and which then became Article XII of the Charter ("the Amendment"), for purported constitutional infirmities. In case number 94-4280, the City contested the district court's award of attorneys' fees and costs in favor of the plaintiffs.

On March 13, 1991, the Cincinnati City Council (the "Council") enacted Ordinance No. 79-1991, commonly known as the "Equal Employment Opportunity Ordinance." This measure provided that the City could not discriminate in its own hiring practices on the basis of

> classification factors such as race, color, sex, handicap, religion, national or ethnic origin, age, *sexual orientation*, HIV status, Appalachian regional ancestry, and marital status. (Emphasis added).

Subsequently, Council on November 25, 1992 adopted Ordinance No. 490-1992 (commonly referred to as the "Human Rights Ordinance") which prohibited, among other things, private discrimination in employment, housing, or public accommodation for reasons of sexual orientation. The opening paragraph of the Human Rights Ordinance expressed the purpose for the legislation as:

> PROHIBITING unlawful discriminatory practices in the City of Cincinnati based on race, gender,

> age, color, religion, disability status, *sexual orientation*, marital status, or ethnic, national or Appalachian regional origin, in *employment, housing,* and *public accommodations* by ordaining Chapter 914, Cincinnati Municipal Code. (Emphasis added).

Among other things, the new law created complaint and hearing procedures for purported victims of sexual orientation discrimination, and exposed offenders to potential civil and criminal penalties.

ERNSR was organized for the purpose of eliminating special legal protection accorded to persons based upon their sexual orientation pursuant to the Human Rights Ordinance. ERNSR campaigned to rescind the Human Rights Ordinance by enacting a proposed City Charter amendment (Issue 3), which was to be submitted directly to the voters on the November 2, 1993 local ballot. On July 6, 1993, plaintiff Equality Foundation of Greater Cincinnati, Inc. ("Equality Foundation") was incorporated by the opponents of the ERNSR agenda. A vigorous political contest between ERNSR and Equality Foundation, involving aggressive campaigning by both sides and high media exposure, ensued over Issue 3.

The ERNSR-sponsored proposed charter amendment ultimately appeared on the November 2, 1993 ballot as:

ARTICLE XII

> ***NO SPECIAL CLASS STATUS MAY BE GRANTED BASED UPON SEXUAL ORIENTATION, CONDUCT OR RELATIONSHIPS.***
>
> The City of Cincinnati and its various Boards and Commissions may not enact, adopt, enforce or administer any ordinance, regulation, rule or policy which provides that homosexual, lesbian,

> or bisexual orientation, status, conduct, or relationship constitutes, entitles, or otherwise provides a person with the basis to have any claim of minority or protected status, quota preference or other preferential treatment. This provision of the City Charter shall in all respects be self-executing. Any ordinance, regulation, rule or policy enacted before this amendment is adopted that violates the foregoing prohibition shall be null and void and of no force or effect.

Issue 3 passed by a popular vote of approximately 62% in favor and 38% opposed and became Amendment XII to the Cincinnati City Charter.

On November 8, 1993, plaintiffs Equality Foundation, several individual homosexuals (Richard Buchanan, Chad Bush, Edwin Greene, Rita Mathis, and Roger Asterino), and Housing Opportunities Made Equal, Inc. ("H.O.M.E.") (a housing rights organization) filed a complaint against the City under 42 U.S.C. § 1983 which alleged that their constitutional rights had been, or would potentially be, violated by the adoption of Issue 3, and sought temporary and permanent injunctive relief, a declaration that the Amendment was unconstitutional, and an award of costs (including attorneys' fees) under 42 U.S.C. § 1988. On November 15, 1993, ERNSR, Mark Miller, Thomas E. Brinkman, Jr., and Albert Moore moved to intervene as parties allied with the City. On November 16, 1993, the trial court preliminarily enjoined the City from enforcing the Amendment. *Equality Foundation of Greater Cincinnati, Inc. v. City of Cincinnati (Equality I)*, 838 F.Supp. 1235, 1243 (S.D. Ohio 1993). On December 27, 1993, the district court granted the intervention motion. On June 3, 1994, the trial court rejected a summary judgment motion initiated by the City and ERNSR.

A bench trial was conducted which generated extensive expert testimony reflecting the social, political, and economic standing of homosexuals throughout the nation and the homophobic discriminations that had been experienced by the

individual plaintiffs and others. Subsequent to trial the judge issued extensive findings of fact.[1] *Equality Foundation of*

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[1] The trial judge made the following findings:

1. Homosexuals comprise between 5 and 13% of the population.

2. Sexual orientation is a characteristic which exists separately and independently from sexual conduct or behavior.

3. Sexual orientation is a deeply rooted, complex combination of factors including a predisposition toward affiliation, affection, or bonding with members of the opposite and/or the same gender.

5. [sic] Sexual behavior is not necessarily a good predictor of a person's sexual orientation.

6. Gender non-conformity such as cross-dressing is not indicative of homosexuality.

8. [sic] Sexual orientation is set in at a very early age -- 3 to 5 years -- and is not only involuntary, but is unamenable to change.

9. Sexual orientation bears no relation to an individual's ability to perform, contribute to, or participate in, society.

10. There is no meaningful difference between children raised by gays and lesbians and those raised by heterosexuals. Similarly, children raised by gay and lesbian parents are no more likely to be gay or lesbian than those children raised by heterosexuals.

11. There is no correlation between homosexuality and pedophilia. Homosexuality is not indicative of a tendency toward child molestation.

12. Homosexuality is not a mental illness.

13. Homosexuals have suffered a history of pervasive irrational and

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invidious discrimination in government and private employment, in political organization and in all facets of society in general, based on their sexual orientation.

14. Pervasive private and institutional discrimination against gays, lesbians and bisexuals often has a profound negative psychological impact on gays, lesbians and bisexuals.

15. Gays, lesbians and bisexuals are an identifiable group based on their sexual orientation and their shared history of discrimination based on that characteristic.

16. Gays, lesbians and bisexuals are often the target of violence by heterosexuals due to their sexual orientation.

17. In at least certain crucial respects, gays, lesbians and bisexuals are relatively politically powerless.

18. Coalition building plays a crucial role in a group's ability to obtain legislation in its behalf. Gays, lesbians and bisexuals suffer a serious inability to form coalitions with other groups in pursuit of favorable legislation.

19. No Federal laws prohibit discrimination based on sexual orientation. Furthermore, voter back-lash around the country has lead [sic] to the repeal of numerous laws prohibiting discrimination against gays, lesbians and bisexuals. In 38 of the approximately 125 state and local communities where some sort of measure prohibiting discrimination based on sexual orientation has been adopted, voter initiated referendums have been placed on the ballot to repeal those gains. 34 of the 38 were approved.

20. The amount of resources spent by the City on processing and investigating discrimination complaints by gays, lesbians and bisexuals is negligible. City resources spent on processing and investigating all sexual orientation discrimination complaints is negligible.

Greater Cincinnati v. City of Cincinnati (Equality II), 860 F.Supp. 417, 426-27 (S.D. Ohio 1994). It concluded that the Amendment infringed the plaintiffs' purported "fundamental right to equal access to the political process," as well as First Amendment rights of free speech and association and the right to petition the government for redress of grievances, which violations of constitutional rights subjected the Amendment to a "strict scrutiny" constitutional evaluation. Additionally, the district court posited that, because homosexuals collectively comprise a "quasi-suspect class," the Amendment was alternatively reviewable under the intermediate "heightened scrutiny" constitutional standard. Moreover, the lower court found that "[the Amendment] was insufficiently linked to any governmental interest to pass constitutional muster" even under the deferential "rational basis" test. Finally, the district court adjudged the Amendment constitutionally deficient tor vagueness. *Id.* at 449. On November 15, 1994, the district court awarded $339,430.25 in attorneys' fees plus $35,028.07 in costs to the plaintiffs, to be paid by the City.

Generally, this court reviews findings of fact for clear error and conclusions of law *de novo*. *United States v. Critton*, 43 F.3d 1089, 1098 (6th Cir. 1995); *Rodgers v. Jabe*, 43 F.3d 1082,

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21. The inclusion of protection for homosexuals does not detract form [sic] the City's ability to continue its protection of other groups covered by the City's anti-discrimination provisions.

22. Amending the City Charter is a far more onerous and resource-consuming task than is lobbying the City Council or city administration for legislation; it requires a city wide campaign and support of a majority of voters. City Council requires a bare majority to enact or adopt legislation.

23. ERNSR campaign materials were riddled with unreliable data, irrational misconceptions and insupportable misrepresentations about homosexuals.

1085 (6th Cir. 1995). However, where ostensible "findings of fact" are, in reality, findings of "ultimate" facts which entail the application of law, or constitute sociological judgments which transcend ordinary factual determinations, such "findings" must be reviewed *de novo*. *Bose Corporation v. Consumers Union of United States, Inc.*, 466 U.S. 485, 500-1 & n.16, 104 S. Ct. 1949, 1959 & n.16 (1984); *Powell v. Texas*, 392 U.S. 514, 52122, 88 S.Ct. 2145, 2148-49 (1968); *Whitney v. Brown*, 882 F.2d 1068, 1071 (6th Cir. 1989). Moreover, mixed questions of law and fact, like pure questions of law or of statutory interpretation, are reviewed *de novo*. *Paul Revere Insurance Co. v. Brock*, 28 F.3d 551, 553 (6th Cir. 1994). Furthermore, the sufficiency of the evidence to support a finding that a constitutional predicate (such as "actual malice" in a defamation action prosecuted by a public official) has been satisfied presents a question of law. *Harte-Hanks Communications, Inc. v. Connaughton*, 491 U.S. 657, 685-89, 109 S. Ct. 2678, 2694-96 (1989); *New York Times v. Sullivan*, 376 U.S. 254, 284-86 & n.26, 84 S. Ct. 710, 728-29 & n.26 (1964). Because most, if not all, of the lower court's findings in the instant case constituted ultimate facts and interrelated applications of law, sociological judgments, mixed questions of law and fact, and/or findings designed to support "constitutional facts" (to wit, the existence of a "quasi-suspect" class, or of a fundamental right which was invaded by the Amendment), *see* Note 1, *supra*, they are subject to plenary review.

The constitutional guarantee of equal protection insulates citizens only from unlawfully discriminatory *state action*; it constructs no barrier against *private* discrimination, irrespective of the degree of wrongfulness of such private discrimination. *Moose Lodge No. 107 v. Irvis*, 407 U.S. 163, 172, 92 S. Ct. 1965, 1971 (1972). The Equal Protection Clause of the Fourteenth Amendment to the United States Constitution did not *compel* the City of Cincinnati to enact legislation to protect homosexuals from discrimination, and accordingly the City, through its ordinary legislative processes, was at liberty to rescind any previous enactments which had fashioned such safeguards. *See Crawford v. Board of Education of Los Angeles*, 458 U.S. 527,

538, 102 S. Ct. 3211, 3218 (1982). Accordingly, the mere *repeal* of certain sections of the Human Rights Ordinance which had previously protected homosexuals, lesbians, and bisexuals was not itself constitutionally assailable. However, the district court ruled that the Amendment not only nullified the previously-enacted special legal protection for homosexuals; rather, it assertedly prevented a distinct class of citizens from exercising certain equal protection and First Amendment rights in the future, which, in the lower court's analysis, triggered constitutional review of the Amendment. *See Equality II*, 860 F.Supp. at 428-34.

The Supreme Court has announced three tests against which the constitutional validity of a law (in this case, a city charter amendment) which purportedly disproportionately burdens a discrete class, or deprives some group of a purported right, may be judged. Generally, the "legislation is presumed to be valid and will be sustained if the classification drawn by the statute [or city charter amendment] is rationally related to a legitimate state interest." *City of Cleburne v. Cleburne Living Center*, 473 U.S. 432, 440, 105 S. Ct. 3249, 3254 (1985). This presumption of validity characteristic of the "rational relationship" rule typically applies to social and economic enactments, where the Court has recognized that "the Equal Protection Clause allows the States wide latitude, [citations], and the Constitution presumes that even improvident decisions will eventually be rectified by the democratic processes." *Id.* By contrast, where a statute targets a "suspect classification" (such as race, alienage, or national origin) which is seldom relevant to any legitimate state interest, or where a constitutional "fundamental right" is assaulted by operation of the legislation, a "strict scrutiny" test (the most rigorous constitutional standard) controls, and the enactment "will be sustained only if [it is] suitably tailored to serve a compelling state interest." *Id.* Finally, where a statute uniquely burdens a "quasi-suspect" class (a categorization such as gender or illegitimacy which, under most circumstances, but not all, does not create a sensible legislative distinction), the intermediate constitutional test of "heightened scrutiny" applies, and such law is presumed invalid unless it is

"substantially related to a sufficiently important governmental interest." *Id.*, 473 U.S. at 440-41, 105 S. Ct. at 3254-55. The trial court, in the instant case, posited that homosexuals comprise a "quasi-suspect" class and, accordingly, applied the intermediate "heightened scrutiny" standard to the equal protection analysis of the Amendment. *Equality II*, 860 F.Supp. at 434-40.

In declaring this novel ruling, the lower court in the instant case misconstrued *Bowers v. Hardwick*, 478 U.S. 186, 106 S. Ct. 2841 (1986), wherein the Court mandated that homosexuals possess no fundamental right to engage in homosexual conduct and consequently that conduct could be criminalized. The *Bowers* Court further directed that the courts should resist tailoring novel fundamental rights. *Id.*, 478 U.S. at 195, 106 S. Ct. at 2846. Since *Bowers*, every circuit court which has addressed the issue has decreed that homosexuals are entitled to no special constitutional protection, as either a suspect or a quasi-suspect class, because the conduct which places them in that class is not constitutionally protected.[2]

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[2] *Steffan v. Perry*, 41 F.3d 677, 684 n.3 (D.C. Cir. 1994) (*en banc*) (following *Padula v. Webster*, 822 F.2d 97, 103 (D.C. Cir. 1987) ("It would be quite anomalous, on its face, to declare status defined by conduct that states may constitutionally criminalize as deserving of strict scrutiny under the equal protection clause")); *Ben-Shalom v. Marsh*, 881 F.2d 454, 464 (7th Cir. 1989), *cert. denied*, 494 U.S. 1004, 110 S. Ct. 1296 (1990) ("If homosexual conduct may constitutionally be criminalized, then homosexuals do not constitute a suspect or quasi-suspect class entitled to greater than rational basis scrutiny for equal protection purposes"); *High Tech Gays v. Defense Industrial Security Clearance Office*, 895 F.2d 563, 571 (9th Cir. 1990) (same); *Woodward v. United States*, 871 F.2d 1068, 1076 (Fed. Cir. 1989), *cert. denied*, 494 U.S. 1003, 110 S. Ct. 1295 (1990) (homosexuality is primarily behavioral in nature and as such is not immutable; "[a]fter *Hardwick* it cannot logically be asserted that discrimination against homosexuals is constitutionally infirm").

Accord, Baker v. Wade, 769 F.2d 289, 292 (5th Cir. 1985) (*en*

The court below distinguished *Bowers* and its progeny by postulating that the Amendment does not create a *conduct*-based classification, but instead demarcated a *status*-based categorization. The trial court found that gays, lesbians, and bisexuals are not identified by any particular conduct; to the contrary, they are distinguished by their "sexual orientation," which references an innate and involuntary state of being and set of drives.[3] *Equality II*, 860 F.Supp. at 440. From this perspective, the Amendment uniquely affected individuals belonging to a discrete segment of society on the basis of their *status* as persons oriented towards a particular sexual attraction or lifestyle. *See id.* at 436-37.

Assuming *arguendo* the truth of the scientific theory that sexual orientation is a "characteristic beyond the control of the individual" as found by the trial court, *see id.* at 437, the reality remains that no law can successfully be drafted that is calculated to burden or penalize, or to benefit or protect, an unidentifiable group or class of individuals whose identity is defined by subjective and unapparent characterstics such as innate desires, drives, and thoughts. Those persons having a homosexual "orientation" simply do not, as such, comprise an identifiable class. Many homosexuals successfuly conceal their orientation. Because homosexuals generally are not identifiable "on sight" unless they elect to be so identifable by conduct (such as public displays of homosexual afection or self-proclamation of homosexual tendencies), they cannot constitute a suspect class or a quasi-suspect class because "they do not [necessarily] exhibit

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banc), *cert. denied*, 478 U.S. 1022, 106 S. Ct. 3337 (1986) (homosexuals compose neither a suspect nor a quasi-suspect class); *National Gay Task Force v. Board of Education of Oklahoma City*, 729 F.2d 1270, 1273 (10th Cir. 1984), *aff'd mem. by an equally divided Court*, 470 U.S. 903, 105 S. Ct. 1858 (1985) (legal classification of gays is not suspect) (both decided prior to *Bowers*).

[3] *See* Findings of Fact Nos. 2-8, *Equality Foundation*, 860 F.Supp. at 426, *quoted* at Note 1, *supra*.

obvious, immutable, or distinguishing characteristics that define them as a discrete group[.]" *Bowen v. Gilliard*, 483 U.S. 587, 602, 107 S. Ct. 3008, 3018 (1987).

Those persons who fall within the orbit of legislation concerning sexual orientation are so affected not because of their orientation but rather by their *conduct* which identifies them as homosexual, bisexual, or heterosexual. Indeed, from the testimony developed by the record (including that of the plaintiffs' expert psychologist, Dr. John Gonsiorek, who attested that most people either engage in sexual behavior which is consistent with their sexual orientation or engage in no sexual activity at all), this court concludes that, for purposes of these proceedings, it is virtually impossible to distinguish or separate individuals of a particular *orientation* which predisposes them toward a particular sexual conduct from those who actually *engage* in that particular type of sexual conduct. *See, e.g., Ben-Shalom v. Marsh*, 881 F.2d at 463-64 (although individual exceptions may exist, a lesbian orientation is compelling evidence that the plaintiff has engaged in homosexual conduct and likely will do so again, and consequently a regulation which classifies lesbians does not categorize merely upon status but also upon the reasonable inferences perceived from probable past and future sexual conduct).[4]

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[4] In any event, the Amendment passes equal protection scrutiny *even if* it is read as affecting a status-defined class, in that it imposes no *punishment* or *disability* upon persons belonging to that group but rather merely removes previously legislated *special protection* against discrimination from that segment of the population:

> It is true that the Constitution forbids *criminal punishments* based on a person's qualities -- we assume that this is what is meant by "status" -- rather than on his or her conduct. [Citation]. Yet, *this proposition has never meant that employment decisions* - which is what *this* case is about -- *cannot be made on such a basis*. One cannot be put in jail for

Therefore, *Bowers v. Hardwick* and its progeny command that, as a matter of law, gays, lesbians, and bisexuals cannot constitute either a "suspect class" or a "quasi-suspect class," and, accordingly, the district court's application of the intermediate heightened scrutiny standard to the constitutional analysis of the Amendment was erroneous.

In the alternative, the district court pronounced that the Amendment had denied the plaintiffs their purported "Fundamental Right to equal participation in the political process," which asserted constitutional deprivation triggered review under the highly demanding "strict scrutiny" standard. *Equality II*, 860 F.Supp. at 430-34. Because the Amendment foreclosed Council from legislating future preferential treatment for homosexuals, the trial court concluded that homosexuals had been deprived of their right to petition the municipal legislative forum for enactments designed to protect and advance their collective agenda. The court below erroneously fashioned this

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having been born blind (although a blind person who drives a truck and kills someone could be jailed for his act). But it obviously would be constitutional for the military to prohibit blind people from serving in the armed forces, even though congenital blindness is certainly a sort of "status." *Steffan v. Perry*, 41 F.3d 677, 687 (D.C. Cir. 1994) (*en banc*) (emphasis partially added) (sustaining military regulations banning homosexuals from the Naval Academy and from service in the Navy).

Compare Bowers v. Hardwick, in which the Supreme Court validated a state-imposed *criminal sanction* against sodomy. By contrast, the Amendment did not punish or prohibit any aspect of the homosexual lifestyle, and indeed did not compel the deprivation of anything from any person by the use of government power because of his or her sexual orientation.

innovative right[5] from three Supreme Court decisions: *Hunter v. Erickson*, 393 U.S. 385, 89 S. Ct. 557 (1969); *Gordon v. Lance*, 403 U.S. 1, 91 S. Ct. 1889 (1971); and *Washington v. Seattle School District No. 1*, 458 U.S. 457, 102 S. Ct. 3187 (1982).

In *Hunter*, the Court strictly scrutinized, and struck down, a voter-adopted amendment to the Akron City Charter which foreclosed the city council from legislating any race-based prohibition against discrimination in private housing without the prior authorization of a majority of the voters. The *Hunter* opinion was anchored in the "suspect classification" of race, *not* in any averred fundamental right to lobby the City council for favorable legislation. *Hunter*, 393 U.S. at 391-92, 89 S. Ct. at 561. *See James v. Valtierra*, 402 U.S. 137, 91 S.Ct. 1331 (1971);[6] *Arthur v. City of Toledo*, 782 F.2d 565, 573 n.2 (6th Cir.

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[5] No circuit court of appeals has expressly recognized a general constitutional right to "participate fully in the political process." However, the United States Supreme Court has recently granted *certiorari* in a case in which the Colorado Supreme Court found a broad fundamental right to participate equally in the political process. *Evans v. Romer (Evans II)*, 882 P.2d 1335 (Colo. 1994), *cert. granted*, ___ U.S. ___, 115 S. Ct. 1092 (1995) (striking down as unconstitutional Colorado's Amendment 2, a voter-initiated amendment to the Colorado constitution similar to Cincinnati's Issue 3). *See also Evans v. Romer (Evans I)*, 854 P.2d 1270, 1276-84 (Colo. 1993), *cert. denied*, ___ U.S. ___, 114 S. Ct. 419 (1993).

[6] In *James*, a voter-approved amendment to the California constitution directed that no public housing project could be maintained without the prior approval of a majority of those voting in the local community election. This amendment created the same procedural hurdle as reviewed in *Hunter* -- certain classes of local legislation could take effect only with the approval of the majority of local voters. However, in *James*, no suspect class or fundamental right was at issue. The *James* Court declared:

The Court [in *Hunter*] held that the amendment

1986). Likewise, *Washington v. Seattle School District No. 1*, in which the high Court invalidated a state voter approved initiative which was designed to preclude bussing of students to achieve racial desegregation, turned upon a suspect racial classification. *Washington*, 458 U.S. at 48487, 102 S. Ct. at 3202-4. *See also Arthur*, 782 F.2d at 573 n.2, 574. Finally, *Gordon v. Lance* involved the recognized fundamental right to *vote*,[7] not an all-inclusive asserted right to participate fully in the political process. *Cf. Taxpayers United for Assessment Cuts v. Austin*, 994

> created a classification based upon race because it required that laws dealing with racial housing matters could take effect only if they survived a mandatory referendum while other housing ordinances took effect without any such special election.
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> * * * * * *
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> *Unlike the Akron referendum position, it cannot be said that [the California amendment] rests on "distinctions based on race."* [Citation]. The [California] Article requires referendum approval for any low-rent housing project, not only for projects which will be occupied by a racial minority. And the record here would not support any claim that a law seemingly neutral on its face is in fact aimed at a racial minority. [Citation]. *The present case could be affirmed only by extending Hunter, and this we decline to do. Id.*, 402 U.S. at 140-41, 91 S. Ct. at 1333. (Emphasis added).

[7] In *Gordon*, the Justices *rejected* the claim that a state constitutional requirement that state bonded indebtedness or tax rates may not exceed certain levels in the absence of 60% voter approval by referendum violated the United States Constitution, dictating that this provision deprived no group of its fundamental right to vote, even though in some instances a majority vote would be insufficient to affect policy on a particular subject, and further ruled that no "discrete or insular minority" was disabled thereby. *Id.*, 403 U.S. at 2-6; 91 S. Ct. at 1890-92.

F.2d 291 (6th Cir. 1993) (ruling that, unlike voting, the "right" to sign an initiative petition, and the "right" to obtain certification of a proposed initiative, are not fundamental, thereby deciding by necessary implication that non-voting forms of political activity are not categorically fundamental).

The instant Amendment deprived no one of the right to vote, nor did it reduce the relative weight of any person's vote. Pursuant to the Amendment, homosexuals remained empowered to vote for City Council members and to lobby those Council members concerning issues of interest. The only effect of the Amendment upon Cincinnati citizens was to render futile the lobbying of Council for preferential enactments for homosexuals *qua* homosexuals because the electorate placed the enactment of such legislation beyond the scope of Council's authority. *See Hunter*, 393 U.S. at 392, 89 S. Ct. at 561. The Amendment does not impair homosexuals and other interested parties from seeking to repeal the Amendment on another day through the same political process by which Issue 3 became law -- the charter amendment procedure. In addition, gays, lesbians, and bisexuals may seek relief through other political avenues and fora, such as the Ohio state legislature or the United States Congress. As the *realization* of their political agenda is not constitutionally guaranteed, the narrow restriction created by the Amendment upon the political avenues available to the unidentifiable and non-protected class of homosexuals and their allies respecting a narrow spectrum of substantive issues clearly does not rise to constitutional dimensions. Those who opposed Issue 3 simply lost one battle of an ongoing political dispute.

The district court directed that the Amendment impermissibly burdened the plaintiffs' First Amendment rights of free speech and association, and their right to petition the government for redress of grievances. *Equality II*, 860 F.Supp. at 444-47. This reviewing court rejects that conclusion. The Amendment erected no official obstacle to the exercise of anyone's free speech or free association rights. The Amendment's forbearance from prohibiting private citizen discrimination against homosexuals for public homosexually oriented speech or

association is constitutionally nonproblematic because the First Amendment prohibits only *governmental* burdens upon speech and association; it does not command the government to insulate any person from the effects of *private* action resulting from the exercise of free speech or association rights.[8] *See, e.g., United States v. Kokinda*, 497 U.S. 720, 725, 110 S. Ct. 3115, 3119 (1990) (private businesses enjoy absolute freedom from First Amendment constraints); *Philadelphia Newspapers, Inc. v. Hepps*, 475 U.S. 767, 777, 106 S. Ct. 1558, 1564 (1986) (the First Amendment by its terms applies only to governmental action). Finally, the plaintiffs' right to petition the government for redress of grievances has not been violated, because, as already discussed, gay, lesbian, and/or bisexual access to Council and to other political avenues and fora has not been obstructed.

Because the Amendment implicated no suspect or quasi-suspect class and burdened no fundamental right, the "rational relationship" test (which dictates that the legislation must stand if it is rationally related to any legitimate state interest) is the appropriate standard by which the constitutionality of the Charter Amendment should be judged. *See City of Cleburne, supra.* Under this highly deferential standard, social or economic legislation must be affirmed "if there is any reasonably

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[8] Furthermore, the Amendment's removal of special protection for homosexuals from the City's official hiring practices is not constitutionally invalid. The Amendment did not *mandate* governmental discrimination against homosexuals in municipal employment but rather merely eliminated the categorical bar embodied in the Equal Employment Opportunity Ordinance which precluded *all* sexual orientation-based employment discrimination by the City in every context. The eradication of this all-encompassing special protection does not remove whatever restraints the Constitution may independently impose upon the City regarding employment practices as related to the exercise of free speech or free association rights, or other constitutional rights, by municipal employees or job applicants. This appellate review need not decide, and therefore does not address, the scope of this constitutional safeguard, if any, in the instant appeal.

conceivable state of facts that could provide a rational basis for the classification." *Federal Communications Commission v. Beach Communications, Inc.*, _____ U.S. _____, 113 S. Ct. 2096, 2101 (1993). The party challenging the rationality of legislation bears the burden of negating *every conceivable basis* for the act, regardless of whether or not such supporting rationale was cited by, or actually relied upon by, the promulgating authority.[9] *Id.* at 2102. In reviewing the justifications for a legislative enactment, the court may not "sit as a superlegislature to judge the wisdom or desirability of legislative policy determinations made in areas that neither affect fundamental rights nor proceed along suspect lines." *Heller v. Doe by Doe*, _____ U.S. _____, 113 S. Ct. 2637, 2642 (1993), *quoting New Orleans v. Dukes*, 427 U.S. 297, 303, 96 S. Ct. 2513, 2517 (1976) (*per curiam*).

The trial court also erroneously ruled that the Amendment did not rationally relate to any permissible public purpose. *Equality II*, 860 F.Supp. at 440-44. However, to the contrary, the Amendment potentially furthered a litany of valid community interests. It encouraged enhanced associational liberty on the part of Cincinnati residents respecting the sexual orientation issue by eliminating exposure to the punishment mandated by the Human Rights Ordinance against certain persons who elected to disassociate themselves from homosexuals. The Amendment repealed an official municipal policy judgment respecting homosexuality, erstwhile conveyed via the Human Rights Ordinance and the Equal Employment Opportunity Ordinance, thus returning the municipal government to a position of

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[9] Indeed, in the referendum context, it is *impermissible* for the reviewing court to inquire into the possible actual motivations of the electorate in adopting the proposal. *Arthur*, 782 F.2d at 574; *Clarke v. City of Cincinnati*, 40 F.3d 807, 815 (6th Cir. 1994), *petition for cert. filed*, 63 U.S.L.W. 3707 (U.S. March 16, 1995) (No. 94-1536). Instead, the court must consider all hypothetical justifications which potentially support the enactment. *Beach Communications, supra.*

neutrality on the issue.[10] Additionally, the measure reduced governmental regulation of the private social and economic conduct of Cincinnati residents, and augmented the degree of personal autonomy and collective popular sovereignty legally permitted concerning deeply personal choices and beliefs which are necessarily imbued with questions of individual conscience, private religious convictions, and other profoundly personal and deeply fundamental moral issues. In turn, this public dichotomy decreased municipal supervision of private conduct, which necessarily may result in some cost savings for the City's taxpayers. These values, and others, were at least arguably advanced by the Amendment, and therefore, irrespective of this court's view of the desirability of the Amendment as a matter of public policy, this court cannot say that the Amendment was not rationally related to a legitimate state objective. Accordingly, it infringes no constitutionally protected right and may stand as enacted.

The lower court also invalidated the Amendment by theorizing that it was unconstitutionally vague, because it affected only special legal protection for "gays, lesbians, and bisexuals," whereas the Human Rights Ordinance had erstwhile protected *all* persons based upon their sexual orientation. The district court found that plaintiff H.O.M.E. and other private employers in the City were confronted by a hiring dilemma as a result of a purported ambiguity inherent in the Amendment. *Equality II*, 860 F.Supp. at 447-49. Initially, it is noted that plaintiff H.O.M.E. is without standing to assert its argument because it has suffered no actual or imminent injury by the implementation of the Amendment, nor do its assertions present a case in controversy. *See Allen v. Wright*, 468 U.S. 737, 750-51, 104 S. Ct. 3315, 3324

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[10] Even if the Amendment is construed to reflect the majority's moral views respecting homosexuality, the Supreme Court has dictated such articulations to constitute a legitimate governmental interest. *Bowers*, 478 U.S. at 196, 106 S. Ct. at 2846 (a state criminal sodomy statute is justified as an expression of the belief of the electoral majority that homosexuality is immoral).

(1984); *Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.*, 454 U.S. 464, 473, 102 S. Ct. 752, 759 (1982). Rather, H.O.M.E. has merely asserted an abstract hypothetical scenario and conjectured that it was unable to determine if the employment of a homosexual, lesbian, or bisexual because of his or her sexual orientation would be civilly or criminally actionable under the Human Rights Ordinance as anti-heterosexual discrimination. Moreover, even if H.O.M.E. had standing below, the vagueness issue has been rendered moot by Council's March 8, 1995 amendment to the Human Rights Ordinance (per Ordinance No.66-1995) which struck all references to "sexual orientation" from the legislation. At the present time, the City's municipal ordinances provide no protection against private discrimination to any citizen by reason of sexual orientation, irrespective of whether that orientation is heterosexual, homosexual, lesbian, or bisexual. *See, e.g., Mosley v. Hairston*, 920 F.2d 409, 414 (6th Cir. 1990).

Accordingly, the judgment below in favor of the plaintiffs is hereby REVERSED, and the district court's permanent injunction against implementation and enforcement of Amendment XII is hereby VACATED. Because the plaintiffs are no longer the prevailing parties in this litigation, the lower court's award of costs (including attorneys' fees) in their favor and against the City is hereby VACATED in its entirety. *Lewis v. Continental Bank Corporation*, 494 U.S. 472, 483, 110 S. Ct. 1249, 1256 (1990); *Clark v. Township of Falls*, 890 F.2d 625, 626-28 (3rd Cir. 1989). This cause is hereby REMANDED to the district court for entry of judgment in favor of the defendants, and for such further necessary and appropriate proceedings and orders as are consistent with this decision.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

EQUALITY FOUNDATION OF GREATER CINCINNATI, INC. et al.,	:	C-1-93-773
Plaintiffs,	:	*ORDER ISSUING PERMANENT INJUNCTION*
v.	:	
THE CITY OF CINCINNATI,	:	
Defendant.	:	

This matter is before the Court for decision following a bench trial conducted on June 20-24, 1994. In rendering our decision on this matter, we have considered the testimony of the witnesses, the documents admitted into evidence, the Intervening Defendants' Proposed Findings of Fact and Conclusions of Law (doc. 59), the Plaintiffs' Proposed Findings of Fact and Conclusions of Law (doc. 60), the Defendant's Post Trial brief (doc. 75), the Intervening Defendants' Supplemental Proposed Findings of Fact and Conclusions of Law (doc. 77), the Plaintiffs' Supplemental Proposed Findings of Fact and Conclusions of Law (doc. 78), and the briefs of Amici Curiae, the Ohio Human Rights Bar Association (doc. 12), the Ohio Psychological Association (doc. 14), and the Ohio Attorney General's Office (doc. 80).[1]

[1] Prior to trial this Court considered the Defendant City of Cincinnati's Motion for Summary Judgement (doc. 37), the Intervening Defendant's Motion for Summary Judgment (doc. 41), the Intervening Defendant's Memorandum in Support of its Motion for Summary Judgement (doc. 40), and the Plaintiffs' Memorandum in Opposition (doc. 43). In our Order filed June 3, 1994, this Court denied those motions. See Order Denying Motions for Summary Judgement, Document 52.

In weighing the testimony of the witnesses, we considered each witness' relationship to the Plaintiff or to the Defendant; their interest, if any, in the outcome of the trial; their manner of testifying, particularly where they testified in Court; their opportunity to observe or acquire knowledge concerning facts about which they testified; and the extent to which they were supported or contradicted by other credible evidence. Under Fed.R.Civ.P.52, we have set forth our findings of fact and conclusions of law below.

The following decision represents the culmination of at least one phase of an emotional, highly controversial and hotly contested law suit. Both sides have been represented by extremely competent and thoroughly prepared attorneys who presented their respective cases forcefully and persuasively. In light of the nature of this case, it is to their credit that the trial on the merits proceeded in accordance with the highest spirit of cooperation and consideration for each other and the Court. Before rendering our decision, however, we must make a few things clear.

In voiding the Issue 3 Amendment, this Court is in no way giving any group any rights above and beyond those enjoyed by all citizens. To the contrary, we are simply, but crucially, preventing one group of citizens from being deprived of the very rights we all share.

Furthermore, nothing in this Order should be construed in any way as impugning the integrity or motives of those who voted in favor of the passage of the Issue 3 Amendment. Likewise we are not in any way depriving anyone of the right to vote, nor are we undermining the importance of that vote. Rather, this Order

merely explores the permissible scope of governmental legislation under the Constitution. And despite the fact that a majority of voters may support a given law, rights protected by the Constitution can never be subordinated to the vote of the majority. While at times this may *seem* unfair, especially when deeply emotional issues are involved, indeed it is the fairest, and most deeply rooted, of all of this Nation[']s rich traditions. It is in this vein that we make the following ruling.

INTRODUCTION

In 1991 and 1992, by majority vote, the Cincinnati City Council enacted the following ordinances aimed at eradicating certain discriminatory practices within the City of Cincinnati: Cincinnati City Ordinance No. 79-1991 ("Equal Employment Opportunity Ordinance" or "EEO"), and Cincinnati City Ordinance No. 490-1992 ("Human Rights Ordinance" or "HRO").

The EEO prohibits discrimination based upon sexual orientation in city employment and in appointments to city boards and commissions. Discrimination based upon sexual orientation, whether it be heterosexual, gay, lesbian, or bisexual, is prohibited by this ordinance. The EEO also prohibits discrimination based on race, color, sex, disability, religion, national or ethnic origin, age, HIV status, Appalachian regional ancestry, and marital status.

The HRO prohibits discrimination based upon sexual orientation, in the areas of private employment, public accommodations and housing. Discrimination based upon sexual orientation, whether it be heterosexual, lesbian, gay or bisexual, is prohibited by this ordinance. The Human Rights Ordinance provides exemptions for fraternal and religious organizations and expressly prohibits use of the ordinance to create "affirmative action program eligibility." Like the EEO, the HRO also prohibits discrimination based on race, color, sex, disability, religion, national or ethnic origin, age, HIV status, Appalachian regional ancestry, and marital status. The HRO provides civil and

criminal penalties for violators of its provisions.[2] It also includes a severability clause.[3]

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[2] Section 914-9 of the HRO provides in relevant part that if conference and conciliation fails to eliminate the offensive practices, a

> notice of violation and order to cease and desist . . . shall be served on the respondent and complainant, . . . [and if the unlawful discriminatory practice has not been eliminated within 30 days thereof] the Complaint Officer shall take action to refer the matter to the city manager or the city manager's designee for civil or criminal enforcement.

Section 914-11 provides that,

> If after 30 calendar days following service of an order to cease and desist, the respondent has not eliminated or corrected the unlawful discriminatory practice, the Complaint Officer is authorized to impose a fine of $100 per day for each day of substantial non-compliance with the provisions of this chapter, but not to exceed a total of $1000.
>
> The city manager is authorized to institute through the city solicitor in the name of the City of Cincinnati any appropriate civil enforcement proceedings.

Finally, section 914-13 provides that,

> Any person who commits an unlawful discriminatory practice under any of the provisions of this chapter and fails to obey any order of the city manager or his duly authorized designee to cease and desist such unlawful discriminatory practice shall be guilty of failure to comply with an unlawful discriminatory practice order, a misdemeanor in the fourth degree.

[3] Section 914-17 provides that the HRO,

Largely in response to the enactment of the HRO, a group of individuals formed an organization called "Take Back Cincinnati," which later changed its name to "Equal Rights Not Special Rights." The group organized for the purpose of gathering the signatures sufficient to place on the ballot at the next general election, a proposed amendment to the Charter of the City of Cincinnati. As a result of their efforts, the proposed charter amendment, which became known as Issue 3, was placed on the November 2, 1993 ballot. Issue 3 provides in full:

ARTICLE XII
NO SPECIAL CLASS STATUS MAY BE GRANTED BASED UPON SEXUAL ORIENTATION, CONDUCT OR RELATIONSHIPS.

> The City of Cincinnati and its various Boards and Commissions may not enact, adopt, enforce or administer any ordinance, regulation, rule or policy which provides that homosexual, lesbian, or bisexual orientation, status, conduct, or relationship constitutes, entitles, or otherwise provides a person with the basis to have any claim of minority or protected status, quota preference or other preferential treatment.

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and each section and provision . . . thereunder, are hereby declared to be independent divisions and subdivisions and, notwithstanding any other evidence of legislative intent, it is hereby declared to be the controlling legislative intent that if any provisions of said chapter, or the application thereof to any person or circumstance is held to be invalid, the remaining sections or provisions and the application of such provision to any person or circumstances other than those to which it is held invalid, shall not be affected thereby, and it is hereby declared that such sections and provisions would have been passed independently of such section or provision so known to be valid.

> This provision of the City Charter shall in all respects be self-executing. Any ordinance, regulation, rule or policy enacted before this amendment is adopted that violates the foregoing prohibition shall be null and void and of no force or effect.

The campaign for Issue 3 was waged by its proponents largely on the theme of repealing "special rights" for homosexuals. Issue 3's proponents employed the use of, among other things, mailings, television and radio ads and speeches. The theme of gays as pedophiles and homosexuality as simply a matter of "who one chooses to have sex with"[4] were far from absent from the campaign.

The Plaintiffs['] campaign was waged with no less vigor, the most notorious aspect being their ubiquitous "Hitler-KKK-McCarthey" billboards appearing throughout the City. After a bitter and often inflammatory campaign, the voters of Cincinnati approved the measure by a vote of approximately 62% to 38%.

On November 8, 1993 the Plaintiffs filed this law suit challenging the constitutionality of Issue 3. The Plaintiffs allege that Issue 3 violates their rights to equal protection, free speech, free association and redress of grievances guaranteed by the First and Fourteenth Amendments to the United States Constitution. They also claim that Issue 3 is unconstitutionally vague.

With respect to their equal protection claims, they maintain that they belong to a suspect or quasi-suspect class, thus requiring strict or heightened judicial scrutiny of Issue 3. Strict scrutiny is also necessary, according to the Plaintiffs, because Issue 3 violates their constitutional right to equal access to the political process. They further maintain that Issue 3 is unconstitutional under any equal protection standard of review because it is not

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[4] See Plaintiffs' Exhibit 2, at 10; See also Plaintiffs' Exhibit 27.

even rationally related to any legitimate government process. The Plaintiffs have filed this suit under 42 U.S.C. § 1983.

On the other hand, the Defendants maintain that there is no "fundamental right to equal participation in the political process" nor are the Plaintiffs members of a suspect or quasi-suspect group. Thus, they claim, Issue 3 need not be subjected to strict or heightened scrutiny, but rather only rational basis review. The Defendants have presented several governmental interests they claim Issue 3 furthers, and which, they maintain, are sufficient to survive review under any of the equal protection standards.

For example, the Defendants claim that Issue 3 serves the governmental purposes of saving scarce resources and reducing the level of governmental regulation imposed upon the citizenry. They also claim that Issue 3 promotes diversity of thought and allows different groups in the community to hold divergent views on this question by "not imposing a uniform, doctrinaire view concerning the moral relevance of homosexual behavior on all segments of the community."

The Defendants further claim that Issue 3 gives legal effect to Cincinnati's collective notion of morality, and also serves to protect and nurture the nuclear family. Additionally, the Defendants maintain that Issue 3 advances democracy and political integrity by allowing the citizens to make this important decision for themselves and preserves their ability to define and limit the powers of their elected representatives. Issue 3, the Defendants contend, is simply a legitimate restriction on the scope of the City Council's powers to deal with certain issues of public importance.

Finally, the Defendants claim that Issue 3 does not infringe any First Amendment Rights, nor is it unconstitutionally vague.

In short, the Defendants assert that Issue 3 does not impose any impermissible burdens on gays, lesbians and bisexuals.[5]

Following a contested evidentiary hearing, this court issued a preliminary injunction on November 16, 1993 prohibiting the implementation of Issue 3. A written opinion followed on November 19, 1993, *see Equality Found. v. City of Cincinnati*, 838 F. Supp. 1235 (S.D. Ohio 1993) ("Equality" or "Order"). The findings of fact set out in that opinion are hereby adopted and fully incorporated into this decision. The testimony received in connection with that hearing is also hereby admitted for all purposes in this case.

THE PARTIES

The Plaintiffs

EQUALITY FOUNDATION OF GREATER CINCINNATI, INC., is an Ohio not-for-profit corporation. Its purpose, as stated in its bylaws, "is the achievement of equality for all individuals. Equality Foundation particularly seeks to promote understanding and education concerning the issues of discrimination and hate against all people and to eliminate bigotry and discrimination against all people through public education and research." Equality Foundation was formed in an effort to oppose discrimination and promote anti-discrimination laws that include protections based upon sexual orientation when the possibility of an anti-gay initiative arose in the summer of 1993. Equality Foundation sued on its own behalf and on behalf of its members.

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[5] The Defendants also assert that "Since City Council itself could repeal the Human Rights Ordinance's protection of Homosexuals, the perceived constitutional evil of Issue 3 must be that this same result was obtained through direct democratic action." We disagree with this for at least one reason: it is beyond dispute that Issue 3 is more than a mere repeal measure but blocks all future city coun[cil] legislation on behalf of gays[,] lesbian[s] and bisexual[s].

RICHARD BUCHANAN is a gay man residing in Cincinnati. He is an attorney with a general practice of law. Mr. Buchanan is a registered voter and a political activist who seeks to secure equal rights for lesbians, gay men and bisexuals. He is a former candidate for City Council, a member of the Cincinnati Human Relations Commission, and was a major proponent of the Cincinnati Human Rights Ordinance passed by the Cincinnati City Council in 1992.

CHAD BUSH is a gay man who has a pending charge of discrimination in public accommodations under the Cincinnati Human Rights Ordinance. Mr. Bush received a letter from the City after the passage of Issue 3 stating that it is no longer enforcing the provisions of the Human Rights Ordinance which protect Mr. Bush from discrimination.

EDWIN GREENE is an African-American gay man. He is a registered voter in and a resident of the City of Cincinnati. He alleges that he has suffered discrimination in the past at establishments covered by the Cincinnati Human Rights Ordinance due to his race and sexual orientation and anticipates that he will suffer the indignities of discrimination again at such establishments.

RITA MATHIS is an African-American lesbian who resides in, and is a registered voter in, the City of Cincinnati. Ms. Mathis is a political activist who seeks to secure equal rights for lesbians, gay men and bisexuals. Ms. Mathis is also a mother who fears that the passage of Issue 3 will stigmatize her child.

ROGER ASTERINO is a gay man employed by the City of Cincinnati. Mr. Asterino has a pending charge of discrimination under the City's Equal Opportunity in Employment Ordinance.

HOUSING OPPORTUNITIES MADE EQUAL (H.O.M.E.) is a civil rights organization with diverse membership including people of all races and sexual orientations. HOME promotes equal housing opportunity for all people in Cincinnati. HOME uses existing fair housing laws including the Cincinnati Human

Rights Ordinance to advocate for gay men, lesbians and bisexuals who have been denied equal housing opportunity based upon their sexual orientation. HOME sued on its own behalf and on behalf of its members.

The Defendants

The Defendant CITY OF CINCINNATI is a municipal corporation organized and existing under the Constitution and laws of the State of Ohio and exercising the power of home rule pursuant to the Cincinnati City Charter.

The Intervening Defendant Equal Rights Not Special Rights (ERNSR) is an Ohio political organization that promoted and advocated the passage of Issue 3. ERNSR was permitted to intervene, claiming that intervention would ensure a complete defense on all issues.

The Intervening Defendants MARK MILLER, THOMAS E. BRINKMAN, Jr., and ALBERT MOORE are individuals designated as the Committee pursuant to Ohio Election law to represent the citizens who petitioned to place Issue 3 on the ballot.[6]

SUMMARY OF TESTIMONY

The parties in this case presented at trial and through affidavits and depositions, the testimony of a variety of witness[es] ranging from historians, political scientists and psychologists, to experts in the areas of civil rights and municipal law. These witnesses, on the whole, were extremely knowledgeable, well-prepared and credible. Among those who testified in person and via affidavit

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[6] The Defendant City of Cincinnati, the Intervening Defendant ERNSR, and the Intervening Defendants Mark Miller, Thomas E. Brinkman, Jr., and Albert Moore, shall be collectively referred to as "Defendants" throughout this opinion.

and/or deposition include, but are not limited to, the following individuals:

Dr. John Gonsiorek, a highly credentialed psychologist. He testified in person at the hearing on the motion for preliminary injunction, and also via deposition which is part of the record in this case. The subject matter of his testimony included, among other things, the psychological impact of discrimination against gays, lesbians and bisexuals on those individuals. He also testified that sexual orientation is an involuntary status, that it sets in at an early age, that it is unamenable to techniques designed to change it (which he described as unethical), and also that sexual orientation is distinct from, and exists wholly independently of, sexual behavior or conduct.

Dr. Gonsiorek also addressed numerous myths and misconceptions about homosexuals particularly those regarding pedophilia. He testified that there is no correlation between a particular orientation and pedophilia, and "that it is a myth that gay men molest children more than heterosexuals do." Transcripts of proceeding, Doc. 29(b), at 188. He also testified that there is no meaningful difference between children raised by homosexuals and those raised by heterosexuals, and that children raised by homosexuals were no more likely to be gay or lesbian or be maladjusted. Not only was Dr. Gonsiorek a very competent and credible witness, but his testimony was not seriously refuted by the defense. Significantly, counsel for the Defendants conceded during closing arguments that "your sexual orientation is not something that you choose . . ." See Transcript of Proceedings, Doc. 79 at 11.

The Court also received testimony from Professor George Chauncey, an historian from the University of Chicago, with expertise in social history and the social history of gays and lesbians. Professor Chauncey has impressive credentials in the above areas. He testified via affidavit and deposition.

Professor Chauncey testified extensively regarding the history of discrimination against homosexuals, and how such

discrimination was both status and conduct based. He described the pervasiveness of the discrimination, both public and private, and how this anti-gay bias was perpetrated throughout all levels of society and government, from state and local law enforcement activities to a former presidential directive against homosexuals, and the purging of homosexuals from government employment and private employment by government contractors.

He also described how local laws were employed to crush early gay political organization, and how public antipathy and stereotyping was prevalent. He also described the prevalence of anti-gay violence. Professor Chauncey's testimony was not only supported by other evidence in this case, but it too was not seriously contested by the Defendants.

At the trial, John Burlew, an attorney with experience in local politics and a member of the Ohio Civil Rights Commission testified on behalf of the Plaintiffs. He testified as to the importance of political groups forming coalitions in order to obtain favorable legislation. He also stated that groups needing the help of gays, lesbians and bisexuals still refuse to form coalitions with them because of the strong dislike for that group. He stated, among other things, that because of this inability to form coalitions gays, lesbians and bisexuals have a diminished ability to obtain favorable legislation on their behalf. The Court found Mr. Burlew to be very knowledgeable, credible, and informative.

The Court also heard the testimony of Professor Kenneth Sherrill, a Professor of political science at Hunter College in New York City. Professor Sherrill offered his opinion of the relative political power of gays, lesbians and bisexuals. He testified that gays, lesbians and bisexuals experience a striking level of dislike from the population in general. He testified that because of the hatred towards this group it is difficult for them to form political coalitions. He also noted that there are many more anti-gay initiatives than there are initiatives against other groups. In testifying that there was no "gay agenda" that he was aware of, he

added that those who organized the "March on Washington" did not represent the mainstream homosexual population.

Professor Sherrill testified that federal, state and local lawmakers have proposed and enacted numerous bills and laws which limit the rights of, and public discussion about, gays[,] lesbians and bisexuals. Professor Sherrill also testified that [] gays earn roughly the same income as that of the average citizen but perhaps a bit less, and that the data collected in the United States Census reports are not entirely anonymous and that this could deter gays, lesbians and bisexuals from answering truthfully.

The Court also received the testimony via deposition of Darrell Ludlow, a consumer services investigator in the City of Cincinnati's Office of Consumer Services. Mr. Ludlow testified that the inclusion of anti-discrimination provision[s] for gay[s,] lesbian[s] and bisexuals, in the Cincinnati Human Rights Ordinance did not prevent the City from enforcing the Ordinance's protection for other groups. Mr. Ludlow also testified that the Cincinnati Human Rights Ordinance did not require quotas or affirmative action for gay people.

Dr. Marcus Conant, M.D., a physician with a practice specializing in the treatment of AIDS patients, testified on behalf of the Plaintiffs via affidavit. Besides attacking many of the medical assertions found in ERNSR campaign material, he also testified that in his opinion, Issue 3 does not advance any interest in public health and is likely to be counterproductive to efforts to prevent HIV infection and its spread, and to encourage the early diagnosis and treatment of HIV infection.

On the defense side, the Court heard testimony from Dr. Allan C. Carlson, an historian and president of the Rockford Institute, in Rockford, Illinois, an organization which focuses on issues related to culture, social trends and their effects. He testified knowledgeably and credibly regarding the importance of the family, and how the breakdown of the family generally has a detrimental impact on children and society in general. He further

testified that where the family unit disintegrates the government generally must step in. This, he testified, is problematic for several reasons, including the fact that it increases government bureaucracy and because the government is not a good substitute for a healthy family unit.

Dr. Carlson also testified that there is no consensus as to the definition of "family" and that numerous definitions exist[]. He acknowledged that gays can be involved in committed relationships and that irresponsible heterosexual behavior was possibly more responsible for the disintegration of the family than are homosexuals. Similarly, he noted that divorce shatters the family and hurts children.

The Defendants also offered the testimony of Professor Ha[dley] Arkes, a professor of political science and jurisprudence at Amherst College in Massachusetts. He testified with respect to his view of the moral relevance of homosexuality and how it differs from that of race. He also testified, among other things, that the Human Rights Ordinance caused people to draw the inference that homosexuality was not morally wrong, and that Issue 3 allows people to think freely and to choose.

Professor James David Woodward, a professor of political science at Clemson University also testified for the Defendants. Professor Woodward testified with respect to the relative political power of gays, lesbians and bisexuals. It was his conclusion that they are not relatively politically powerless, due in part to their average level of income and education, and the level of intensity that [the] group, although small in number, feels about certain issues. He agreed that coalition building is crucial in the quest for favorable legislation and also that, due to the unpopularity of homosexuals, most groups still resist forming coalitions with them.

The forgoing was a brief summary of the massive amount of evidence that was admitted into the record and represents only a small sample of the testimony provided by the witnesses summarized above.

FINDINGS OF FACT

1. Homosexuals comprise between 5 and 13% of the population.

2. Sexual orientation is a characteristic which exists separately and independently from sexual conduct or behavior.

3. Sexual orientation is a deeply rooted, complex combination of factors including a predisposition towards affiliation, affection, or bonding with members of the opposite and/or the same gender.

5. [sic] Sexual behavior is not necessarily a good predictor of a person's sexual orientation.

6. Gender non-conformity such as cross-dressing is not indicative of homosexuality.

8. [sic] Sexual orientation is set in at a very earlŷ age--3 to 5 years--and is not only involuntary, but is unamenable to change.

9. Sexual orientation bears no relation to an individual's ability to perform, contribute to, or participate in, society.

10. There is no meaningful difference between children raised by gays and lesbians and those raised by heterosexuals. Similarly, children raised by gay and lesbian parents are no more likely to be gay or lesbian than those children raised by heterosexuals.

11. There is no correlation between homosexuality and pedophilia. Homosexuality is not indicative of a tendency towards child molestation.

12. Homosexuality is not a mental illness.

13. Homosexuals have suffered a history of pervasive, irrational and invidious discrimination in government and private employment, in political organization and in all facets of society in general, based on their sexual orientation.

14. Pervasive private and institutional discrimination against gays, lesbians and bisexuals often has a profound negative psychological impact on gays, lesbians and bisexuals.

15. Gays, lesbians and bisexuals are an identifiable group based on their sexual orientation and their shared history of discrimination based on that characteristic.

16. Gays, lesbians and bisexuals are often the target of violence by heterosexuals due to their sexual orientation.

17. In at least certain crucial respects, gays, lesbians and bisexuals are relatively politically powerless.

18. Coalition building plays a crucial role in a group's ability to obtain legislation in its behalf. Gays, lesbians and bisexuals suffer a serious inability to form coalitions with other groups in pursuit of favorable legislation.

19. No Federal laws prohibit discrimination based on sexual orientation. Furthermore, voter back-lash around the country has lead to the repeal of numerous laws prohibiting discrimination against gays, lesbians and bisexuals. In 38 of the approximately 125 state and local communities where some sort of measure prohibiting discrimination based on sexual orientation has been adopted, voter initiated referendums have been placed on the ballot to repeal those gains. 34 of the 38 were approved.

20. The amount of resources spent by the City on processing and investigating discrimination complaints by gays, lesbians and bisexuals is negligible. City resources spent on processing and investigating all sexual orientation discrimination complaints is negligible.

21. The inclusion of protection for homosexuals does not detract f[ro]m the City's ability to continue its protection of other groups covered by the City's anti-discrimination provisions.

22. Amending the city charter is a far more onerous and resource-consuming task than is lobbying the City Council or city administration for legislation; it requires a city wide c mpaign and support of a majority of voters. City Council requires a bare majority to enact or adopt legislation.

23. ERNSR campaign materials were riddled with unreliable data, irrational misconceptions and insupportable misrepresentations about homosexuals.[7]

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[7] References in this opinion to ERNSR campaign materials are not for the purpose of establishing the "intent" of the voters of Cincinnati in voting for Issue 3. *See Arthur v. Toledo*, 782 F.2d 565, 573-74 (6th Cir. 1986). Rather, this material simply emphasizes the depth and pervasiveness of the inaccurate and unfounded stereotypes about gays, lesbians and bisexuals in our society.

For example, ERNSR campaign materials and statements addressing the subject incorrectly assumed that gay and lesbian sexual orientation and identity are defined solely by engaging in sexual acts with persons of the same sex. Furthermore, despite the far broader preemptive effect on future legislation, Issue 3 was inaccurately promoted as a simple repeal of "special rights for homosexuals" through the use of television and radio advertisement[s], mailings, and other sources. Some of the material, including the following, made confusing and inaccurate references to the supposed criteria a group must meet to be entitled to anti-discrimination legislation[. S]ome of the material stated that,

> While the United States Constitution and Bill of Rights protects all Americans, civil rights laws have been legislated to provide special protection to certain minorities and groups of individuals. These laws and subsequent Supreme Court decisions have identified three criteria that must be met for a group to qualify for special protection:
>
> 1. A group wanting true minority rights must show that it is discriminated against to the point that its members *cannot earn an average income, get an adequate education or enjoy a fulfilling cultural life.*
> 2. The group must be *clearly identifiable* by unchangeable physical characteristics such as skin color, gender, handicap, age, etc.
> 3. The group must clearly show that it is *politically powerless.*

([italicized] portion in original).

This excerpt from a campaign pamphlet clearly confuses the criteria supposedly used by the United States Supreme Court in determining what groups have been entitled to suspect or quasi-suspect status (erroneously implying age and disability are among those groups) and identifying those factors as ones also controlling *legislative* decisions on whether a group is entitled to anti-discrimination legislation. Such representations are inaccurate and misleading. Besides various pamphlets like the one above, the "educational" materials disseminated by the proponents of Issue 3 were patently misleading in several respects. For example, the materials repeatedly referred to "special rights" for homosexuals, while it is beyond dispute that the HRO and the EEO only provided homosexuals with the same protection accorded other groups (groups, who, unlike homosexuals, also enjoy such protection, and more, under federal and state law).

[8] An ordinance may also be passed by popular vote through the initiative process. The other form of voter initiated legislation besides

CONCLUSIONS OF LAW

I

THE ISSUE 3 AMENDMENT

A

The HRO and the EEO are city ordinances, passed by a majority of the members of the City Council. An ordinance, once enacted, may be repealed, subject to the procedures set forth in the City Charter, by a simple majority of City Council members.[8]

Issue 3 is an amendment to the City Charter. The City Charter is the primary governance document of the city, akin to a constitution. 3 James W. Farrell, Ohio Municipal Code § 1.11(a) (11th ed. 1962). Because Issue 3 is an amendment to the City Charter, it becomes part of the city's fundamental law. As such, any and all laws, regulations, ordinances or policies of the City of Cincinnati--with the exception of other charter provisions--are inferior, and any legislation or policy to the contrary is invalid. *Fox v. Lakewood*, 39 Ohio St.3d. 19, 22, 528 N.E.2d 1254 (1988); *Reed v. Youngstown*, 173 Ohio St. 265, 266, 19 0.0.2d 119, 181 N.E.2d 700 (1962); *see*; Charter of the City of Cincinnati, art. I, art. II, §§ 1, 2. The City Charter dictates the scope of the City Council's, and all other city government's authority. *See* Ohio Const. art. XVIII, § 7; see Charter of the City of Cincinnati.

Finally, a provision of the City charter may not be repealed short of amending the charter itself. The charter amendment process, as Guy Guckenberger[9] testified, is a burdensome task that requires a city wide campaign and the support of [a] majority of the voters; it is a far more onerous task than lobbying City Council or [the] city administration for favorable legislation.

Issue 3 provides that the City of Cincinnati, its various boards, and commissions, may not enact, adopt, enforce or administer, any ordinance, regulation, rule or policy which would provide

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the initiative and the charter amendment is the referendum. A referendum is a second way to repeal an ordinance.

[9] Mr. Guckenberger testified at the preliminary injunction hearing. He was [a] member of the City Council for over twenty years. He left City Council in February of 1992 to assume a position as Hamilton County Commissioner, Hamilton County Ohio. The Court found him to be an extremely knowledgeable and credible witness. *See Equality*, 838 F. Supp. at 1236-38.

gays, lesbians and bisexuals with any protection or preferential treatment based on their sexual orientation, status, conduct or relationship. Nowhere are any of these terms defined, including such broad terms as homosexual "relationship," "conduct" and "status" or "protected status" and "preferential treatment." Furthermore, Issue 3's scope is extremely broad, covering not only the city's legislative arm, but also administration by the city's executive offices; it covers not only laws, but also policies promulgated by the city's various commissions and boards.

We conclude that under the plain language of Issue 3, all existing ordinances, regulations, rules or policies, enacted, adopted, enforced or administered by the city which give gays, lesbians and bisexuals protected status or preferential treatment would be null and void. Thus, Issue 3 would prohibit enforcement of those provisions in the EEO and the HRO which prohibit discrimination against gays, lesbians and bisexuals.

We further conclude, however, that Issue 3 is far more than a mere repeal measure. Because of its status as a charter amendment, the City of Cincinnati, including the City Council and all levels of city administration, would be forever barred from enacting, adopting, administering or enforcing any law or policy on behalf of gays[,] lesbians and bisexuals, now and in the future. This sweeping prohibition would include, but would not be limited to, any antidiscrimination measures on behalf of gays, lesbians and bisexuals, and any city policies or programs specifically benefiting the gay community, no matter what the circumstances, no matter how beneficial to the City of Cincinnati as a whole. No city board or commission could so much as adopt a *policy* on behalf of gays[,] lesbians and bisexuals no matter what the need.

In short, under Issue 3's sweeping, all-encompassing language, the City Council and any and all aspects of city administration would no longer have the power to do anything that could be construed as "protecting" gays, lesbians and bisexuals, or giving them "preferential treatment." As Mr. Guckenberger stated, under Issue 3, elected city representatives and other city officials

would be prevented from enacting, adopting, enforcing, or administering, any ordinance, rule, regulation or policy on behalf of gay, lesbian and bisexual citizens, regardless of merit. *See Equality*, 838 F. Supp. at 1237.

Thus, under its very language, Issue 3 completely excludes an entire group of citizens from all areas of city politics with respect to issues of vast importance to that group. Issue 3 completely cuts-off gay[s], lesbians and bisexuals from the normal and accessible avenues of political action and political participation, and requires them to seek a charter amendment any time they want or require any rule, regulation, ordinance[] or policy on their behalf.

Additionally, in light of the HRO's severability clause, Issue 3 would not disturb the provisions in the HRO prohibiting discrimination against persons based upon race, color, sex, disability, religion, national or ethnic origin, age, HIV status, Appalachian regional ancestry, marital status or heterosexual orientation, status, relationship or conduct.

Moreover, Issue 3 is contradictory and confusing on its face, because its title indicates its intent to repeal all protections based on sexual orientation, while the body addresses only homosexual orientation. This ambiguity creates confusion as to its scope. Further confusion is generated by its use of, without defining, such broad terms as homosexual, lesbian or bisexual "orientation, status, conduct, or relationship." Absent some guidance with respect to these terms, it is impossible to ascertain exactly what activities are covered by Issue 3 and what [are] not.

Thus, we conclude that, by its very terms, Issue 3 singles out persons of "homosexual, lesbian or bisexual orientation" for unique treatment not imposed upon any other segment of the community. Furthermore, Issue 3 does not target specific issue[s] or types of problems that affect all citizens, nor does it include all citizens within its restrictions. Rather, Issue 3 targets specific citizens based upon who they are. It removes them from the normal political process and requires them to pursue a more

complex, costly and burdensome avenue in pursuit of any rule, regulation, ordinance or policy, on their behalf.

B

In light of the forgoing, we make the following rulings regarding the Plaintiffs' constitutional challenges. As noted above, the Plaintiffs claim that Issue 3 violates their right to equal protection of the laws. They claim that Issue 3 violates their fundamental right to equal access to the political process and that they belong to a suspect or quasi-suspect category, thus requiring this Court to subject Issue 3 to strict or heightened scrutiny. At the very least, they claim, Issue 3 is not rationally related to any legitimate governmental purpose. Finally, they argue, Issue 3 violates their First Amendment rights to free speech and association and to petition the government for a redress of grievances, and that Issue 3 is unconstitutionally vague. We address the Plaintiffs' equal protection challenges in Parts II through VI, and their First Amendment and vagueness challenges in Part VII of this Order.

II

CONSTITUTIONAL STANDARDS OF REVIEW UNDER THE EQUAL PROTECTION CLAUSE

It is well established that there are three standards of review a Court may apply in reviewing a challenge under the equal protection clause: strict scrutiny, intermediate scrutiny, and rational basis review. *See City of Cleburne v. Cleburne Living Center, Inc.*, 473 U.S. 432, 440, 105 S.Ct. 3249, 3254, 87 L.Ed.2d 313 (1985). Legislation that infringes a fundamental right or a suspect category must be examined under the strict scrutiny standard of review. *See Id.* Under strict scrutiny, the law must be narrowly tailored to serve a compelling governmental interest in order to withstand the constitutional attack. *Id.* Under intermediate scrutiny, the law must be substantially related to an important governmental interest. *Id.* at 441, 105 S.Ct. at 3255. Finally, under rational basis review, the

law must be rationally related to a legitimate governmental purpose. *Id.* at 440, 105 S.Ct. at 3254.

III

FUNDAMENTAL RIGHTS

A

The Plaintiffs claim that Issue 3 violates their Fundamental Right to equal participation in the political process. While we addressed this issue in the context of the Plaintiffs' Motion for Preliminary Injunction, we now conclude as a matter of law, for the reasons stated in our earlier order, that Issue 3 violates the Plaintiffs' [f]undamental [r]ight to [e]qual access to the political process. *See Equality Found. v. City of Cincinnati*, 838 F. Supp. 1235 (S.D.Ohio 1993); *Evans v. Romer*, 854 P.2d 1270 (Colo.), *cert. denied*, ___ U.S. ___, 114 S.Ct. 419 (1993). Consequently, any legislation that disadvantages an independently identifiable group of people by making it more difficult for that group to enact legislation in its behalf, "fences" that group out of the political process, and thereby violates their fundamental rights. *See Equality*, 838 F.Supp. at 1238-42; *Evans*, 854 P.2d at 1282.

The Defendants have raised a number of arguments regarding our analysis in that Order. While we disagree with the Defendants' objections, their position is far from untenable. It is therefore important to address their objections in this order.

The Defendants claim that a number of the cases we relied upon, specifically, *Hunter v. Erickson*, 393 U.S. 385 (1969), *Gordon v. Lance*, 403 U.S. 1 (1971), and *Washington v. Seattle School Dist.*, 458 U.S. 457 (1982), do *not* support the principle that a state may not disadvantage *any* independently identifiable group by making it more difficult for that group to obtain

legislation on its behalf.[10] Rather, the Defendants argue that the doctrine enunciated in *Hunter*, and explored in subsequent cases, involves only the well established principle that legislative classifications involving suspect categories, like race, must be strictly scrutinized.

The Defendants also claim that if the court adopts the fundamental rights theory enunciated in *Equality* and *Romer*, no issue could be relegated to the charter amendment process. According to the Defendants, all charter amendments disadvantage some "identifiable group." That "identifiable group" consists of the supporters of the issue for which the charter amendment is required. The group would be disadvantaged, like the Plaintiffs in this case, because by requiring a charter amendment, the supporters could no longer appeal directly to the City Council for legislation. Thus, the argument goes, *all* issues requiring a charter amendment would be unconstitutional under the fundamental rights theory enunciated in *Equality* and *Romer*. For the following reasons, we decline to retreat from our analysis in *Equality*. *See Equality*, 838 F. Supp. at 1238-42.

First, it is clear that the analysis in *Hunter* goes beyond a routine application of the principle that racial classifications must be strictly scrutinized. For example, the Court exhibits something of a dual analysis, at times emphasizing the purely racial aspect of the legislation involved, while at others focusing on the

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[10] In *Hunter* the Supreme Court invalidated an Akron, Ohio city charter amendment passed by a majority of the voters providing that city council could implement no ordinance dealing with racial, religious, or ancestral discrimination in housing without the approval of a majority of the city's voters. 393 U.S. 385. In *Gordon*, the Court upheld a state's constitutional and statutory mandates requiring approval of 60% of the voters before increasing bonded indebtedness. 403 U.S. 1. In *Washington*, the Court invalidated a statewide initiative which terminated the use of mandatory busing for the purpose of racial integration. 458 U.S. 457.

legislation's impact on the political process. *See Hunter v. Erickson*, 393 U.S. 385, 391, 391-92, 392-93 (1969). Furthermore, the Court observed in unmistakably race-neutral terms, that "the State may no more disadvantage *any particular group* by making it more difficult to enact legislation in its behalf than it may dilute any person's vote or give *any group* a smaller representation than another of comparable size." *Hunter*, 393 U.S. at 393 (citations omitted) (emphasis added).

It is also significant that in analyzing the political participation aspect of the case, the *Hunter* Court relied exclusively on voting cases which had nothing to do with any racial classification. *See Hunter*, 393 U.S. at 393 (citing *Reynolds v. Sims*, 377 U.S. 533 (1964) (invalidating Alabama reapportionment plan which effectively impaired certain citizens' right to vote) and *Avery v. Midland County*, 390 U.S. 474 (1968) (striking down apportionment plan creating disparity in the weight of residents' votes)). This reliance on race-neutral cases contrasts sharply with the traditional race and ancestry cases the Court relied upon in the suspect category portion of its discussion. *See id.* at 391-92. It is thus clear that, despite the Defendants' urging, something more unique was going on than the straight-forward strict scrutiny/racial classification analysis so deeply entrenched in our jurisprudence.[11]

Additionally, if the constitutional defects in *Hunter*, and *Washington v. Seattle School Dist.*, 458 U.S. 457 (1982), were simply the legislative racial classifications, there would have been no need for the Court to stray from the traditional strict scrutiny analysis, and analyze the legislation's impact on the political landscape as it pertained to any group. *See Kramer v. Union Free*

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[11] It is also noteworthy that the *Washington* Court made reference to the "Hunter Doctrine." 458 U.S. at 473. If *Hunter* were merely a race case, the "*Hunter* doctrine" would have to refer to the well-established principle that racial classifications must be strictly scrutinized. Clearly that principle is not known as the "Hunter Doctrine."

School Dist., 395 U.S. 621, 628 n.9 (1969) ("[o]f course, we have long held that if the basis of classification is inherently suspect, such as race, the statute must be subjected to an exacting scrutiny, regardless of the subject matter of the legislation"). It is therefore, not at all surprising that the Court in *Gordon v. Lance*, 403 U.S. 1 (1971), a case not involving race, distinguished *Hunter not* on the grounds that *Hunter* was simply a race case requiring strict scrutiny while *Gordon* was not, but rather on the basis that *Gordon* involved no "independently identifiable group or category" at all. *Equality Found. v. City of Cincinnati*, 838 F.Supp. 1235, 1241, 1241 n.2 (S.D.Ohio 1993); *Evans v. Romer*, 854 P.2d 1270 (Colo.), *cert. denied*, 114 S.Ct. 419 (1993); *See Gordon*, 403 U.S. at 5, 7. Thus, unlike in *Hunter*, the *Gordon* Court observed, the legislation involved was constitutional because the Court could

> discern no *independently identifiable group or category* that favors bonded indebtedness over other forms of financing.

Gordon v. Lance, 403 U.S. 1, 5 (1971) (emphasis added). On the other hand, where state or local constitutional or charter "provisions . . . discriminate against or authorize discrimination against *any identifiable class* they . . . violate the Equal Protection Clause." *Id.* at 7 (emphasis added) (footnote omitted).

Similarly, in *Washington v. Seattle School Dist.*, 458 U.S. 457 (1982), the Supreme Court gave no more than a passing nod to the traditional strict scrutiny/suspect category analysis, let alone apply it in spite of the racial classification in that case. *See Id.* at 485. It can thus *not* be said that *Washington* is simply a race case. Rather the Court's holding rested on the principle that legislation which fails to "allocate governmental power on the basis of any general principle[]" intrudes upon the Equal Protection Clause. *See id.* at 470 (citing *Hunter*, 393 U.S. at 395 (Harlan, J., concurring))

Furthermore, the *Washington* Court speaks in general, race-neutral terms with respect to the right to be free from a

discriminatory political landscape. For example, the Court noted that the Fourteenth Amendment "reaches a political structure" that "distorts governmental processes in such a way as to place special burdens on the ability of minority groups to achieve beneficial legislation." *Washington*, 458 U.S. at 467. The Court also reaffirmed the *Hunter* Court's pronouncement that "the State may no more disadvantage any *particular* group by making it more difficult to enact legislation in its behalf than it may dilute any person's vote or give any group a smaller representation than another." *Id.* at 468 (emphasis added by *Washington* Court) (quoting *Hunter*, 393 U.S. at 393).

Finally, the *Washington* Court concluded that,

> laws structuring political institutions or allocating political power according to "neutral principles"--such as the executive veto, or the typically burdensome requirements for amending state constitutions--are not subject to equal protection attack, though they may "make it more difficult for minorities to achieve favorable legislation." 393 U.S at 394. Because such laws make it more difficult for *every* group in the community to enact comparable laws, they provide[] a just framework within which the "diverse political groups in our society may fairly compete." *Id.* at 393. Thus, the political majority may generally restructure the political process to place obstacles in the path of everyone seeking to secure the benefits of governmental action.

Washington, 458 U.S. at 470 (emphasis in original). But, when the state fails to "allocate governmental power on the basis of general principles," and thereby "disadvantages" some "independently identifiable group or category" by making it more difficult for that group or category [] "to enact legislation in its behalf," the legislative provision in question must be strictly scrutinized. *See Hunter*, 393 U.S. at 393; *Gordon*, 403 U.S. at 5, 7; *Washington*, 458 U.S. at 470, 476-77.

In support of their argument that the defining factor in these cases was the racial aspect, or lack thereof, the Defendants note that *Washington* "is rife with references to *Hunter*, but one is hard-pressed to find a citation to that case that does not simultaneously tie it to the racial classification involved." See Intervening Defendants' Proposed Findings of Fact and Conclusion of Law, Doc. 59, at 50-51 n. 7. While this is true, we find it far from dispositive. Where a statute infringes a fundamental right by placing a limitation on that right on the basis of race, the statute may have multiple constitutional defects. Thus, it is not at all surprising that a case discussing a constitutional right will speak of that right in race-specific terms if the legislation under review *also* draws a racial classification. *See, e.g., Loving v. Virginia*, 388 U.S. 1, 12 (1967) (invalidating Virginia miscegenation law not only on the basis of its racial classification, but *also* because it violated Due Process Clause). Therefore, while we agree that *Hunter* and *Washington* are "rife" with reference[s] to race, we do not agree that it necessarily follows that *Hunter*, *Washington* or their progeny are "race cases" and nothing more.

It is also significant that the Supreme Court in both *Hunter* and *Washington*, equated the constitutional defects in those cases to the violation of an individual's or a group's right to vote. *Hunter* 393 U.S. at 391, 393 (legislation's constitutional defect was no more permissible than "dilut[ing] any person's vote or giv[ing] any group a smaller representation than another of comparable size"); *Washington*, 458 U.S. at 476 (same). Thus, the constitutional violations in *Hunter* and *Washington* were of the same order as those discussed in, for example, *Kramer v. Union Free School Dist.*, 395 U.S. 621 (1969) (invalidating law requiring children or property ownership as precondition to vote); *Avery v. Midland County*, 390 U.S. 474 (1968) (striking down apportionment plan creating disparity in the weight of residents' votes); *Carrington v. Rash*, 380 U.S. 89 (1965) (invalidating law requiring civilian status to vote); *Reynolds v. Sims*, 377 U.S. 533 (1964) (invalidating Alabama reapportionment plan which effectively impaired certain citizens' right to vote). If such Issue 3-type charter amendments are tantamount to a denial of the right

to vote, such charter amendments must be constitutional[l]y infirm when they target *any* individual or group, including gays, lesbians and bisexuals.

Consequently, restructuring the political process in such a way as to make it more difficult for any "independently identifiable group," including gays[,] lesbians and bisexuals, "to enact legislation on its behalf" is no more permissible tha[n] it is to "dilute any person's vote or give any group a smaller representation than another o[f] comparable size." *See Hunter*, 393 U.S. at 391, 393; *Washington*, 458 U.S. at 470, 476.

We therefore conclude that *Hunter* and its progeny did not rest simply on whether the legislation drew a racial classification. Rather these case[s] involved the infringement of rights so central to our political process, rights tantamount to the right to vote, that legislation infringing those rights must be strictly scrutinized regardless of whether any racial classification is involved.

B

To single out a group of citizens and place upon them [an] added and virtually insurmountable burden in their pursuit of protection from majority discrimination thoroughly undermines the spirit of our constitution. In our great society we adhere to the "self evident" truth that all people are created equal. And while we may disagree, and often will, such political contest is an expected and normal byproduct of a diverse and healthy democracy. This political process remains healthy and robust, however, only when all individuals are allowed to compete on an equal footing.

For these very reasons, a state may not single out and disadvantage any *independently* identifiable group by making it more difficult for that group to enact legislation in its behalf; and so doing does not "demonstrate [a] devotion to democracy" *James v. Valtierra*, 402 U.S. 137, 141 (1971), but rather makes a mockery of it. Allowing the majority to prohibit a small, unpopular group of citizens from obtaining favorable legislation

unless they request it directly from the very majority that deprived them [of] access to the legislature in the first place, violates even rudimentary notion[s] of fundamental fairness, and undermines the integrity of our nation. No more fundamental a notion exi[s]ts than that which dictates that all citizens shall have the right to *try* to obtain legislation on their behalf on an equal footing with others. Because Issue 3 contravenes these fundamental notions, it is repugnant to the Constitution, and cannot stand.

Based on the record, we conclude that under the Issue 3 Amendment, all citizens, with the exception of gay[s], lesbian[s] and bisexuals, have the right to appeal directly to the city council for legislation, while only members of the Plaintiffs' independently identifiable group must proceed via the exceptionally arduous and costly route of amending the City Charter before they may obtain any legislation bearing on their sexual orientation. Thus, Issue 3 "fences out" *see Carrington v. Rash*, 380 U.S. 89, 94 (1965), an independently identifiable group of citizens--gays, lesbians and bisexuals--from the political process by unfairly burdening their quest for favorable legislation, regulation and policy. Issue 3, therefore, denies that group an "effective voice in the governmental affairs which substantially affect their lives." *See Kramer v. Union Free School Dist.*, 395 U.S. 621, 627 (1969); *Equality*, 838 F. Supp. at 1241.

We therefore conclude that Issue 3 implicates the Plaintiffs' [f]undamental [r]ight to equal participation in the political process by singling out and disadvantaging an independently identifiable group of citizens--gays, lesbians and bisexuals--by making it more difficult for that group to enact legislation in its behalf. The City may no more do that, than it may dilute *any* person[']s vote, or give *any* group a smaller representation than another of comparable size. As we conclude that Issue 3 implicates a

[f]undamental [r]ight, it must be narrowly tailored to serve a compelling state interest or it must fall.[12]

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[12] The Defendants have expressed their concern that *any* group who supports a given issue for which a charter amendment is required would be an "identifiable group." Thus, they claim, the Court's holdings will "invalidate virtually every charter amendment and referendum, as virtually all legislation adversely affects [identifiable] groups" who will suffer "an inability to lobby the City Council to reverse the results of the public referendum." We agree that any time a group supports an issue for which a charter amendment must be obtained that group is "identifiable" and is in fact "disadvantaged" in the manner that the Defendants describe. However, the difference between an "independently identifiable group" and an "identifiable group" is that where the factor identifying the group transcends the mere support for any given issue, the group is "independently identifiable" within the context of *Gordon*, and *Hunter*. Thus, in *Gordon*, the fact that no "*independently* identifiable group favored bonded indebtedness," saved the provision, although clearly an *identifiable* group favored bonded indebtedness--namely, all of those individuals who *favored* bonded indebtedness. *See Gordon*, 403 U.S. 1.

Thus, the difference between an identifiable group, and an *independently* identifiable group is that the defining characteristic of an independently identifiable group transcends the mere support for a single political issue, such as race, gender or sexual orientation. On the other hand, a group whose sole identifying characteristic is that group's support for a single[] issue is merely an identifiable group. Thus, contrary to the Defendants' concerns, our holding will not jeopardize the entire charter amendment process. Indeed, the Court has clearly upheld the constitutionality of the charter amendment process. *See Gordon*, 403 U.S. 1 (1971) and *James v. Valtierra*, 402 U.S. 137 (1971). It should also be noted that the "simple repeal or modification of. . .antidiscrimination laws, without more, . . ." is not unconstitutional. *Washington*, 458 U.S. at 483 (internal quotation omitted); *Hunter*, 393 U.S. at 390 n.5.

IV

HEIGHTENED SCRUTINY

A

The Plaintiffs also claim that gays[,] lesbians and bisexuals should be classified as a suspect or quasi-suspect class. As such, according to the Plaintiffs, the Court should subject Issue 3 to strict or heightened scrutiny. As noted above, under strict scrutiny the challenged law must be narrowly tailored to serve a compelling governmental interest. *City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 440 (1985). Under heightened scrutiny the law must be substantially related to an important governmental purpose. *Id.* at 441.

Although the Supreme Court has never articulated a precise test for determining which groups should be regarded as suspect or quasi-suspect, the Court has repeatedly considered a number of factors. For example, the Court has considered whether the group's defining characteristic is immutable. *See Frontiero v. Richardson*, 411 U.S. 677, 686 (1973).[13] The Court has also considered whether the group has suffered a history of discrimination, *Frontiero*, 411 U.S. at 684-85; *Cleburne*, 473 U.S. at 441; *Massachusetts Bd. of Retirement v. Murgia*, 427 U.S. 307, 313 (1976), "*or* [if the group has been] relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process." *San Antonio School Ind. Dist. v. Rodriguez*, 411 U.S. 1, 28 (1973) (emphasis added).[14]

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[13] We recognize that the Supreme Court has demonstrated some skepticism as to the relevance of the immutability factor. *Cleburne*, 473 U.S. at 442-43 n.10.

[14] On at least two occasions, in determining what standard of equal protection review was appropriate, the Supreme Court noted the complex and specialized nature of the legislation and the judiciary's

Evidently the most decisive factors the Supreme Court has considered, however, are whether the group's defining characteristic is at all related to its members' ability to participate in or contribute to society, *Cleburne*, 473 U.S. at 441, 442, 443, 444; *Frontiero*, 411 U.S. at 686; *Mathews v. Lucas*, 427 U.S. 495, 505 (1976); *Murgia*, 427 U.S. at 310-11, 315; *see Plyler v. Doe*, 457 U.S. 202, 216 n.14 (1982), and whether the characteristic is beyond the individual's control. *Cleburne*, 473 U.S. at 441 (quoting *Lucas*, 427 U.S. at 505); *Frontiero*, 411 U.S. at 686; *Plyler*, 457 U.S. at 217 n.14 (1982) ("[l]egislation imposing special disabilities upon groups disfavored by virtue of circumstances beyond their control suggests the kind of 'class or caste' treatment that the Fourteenth Amendment was designed to abolish").

Thus, in observing that gender-based legislation must be subjected to heightened scrutiny, the Supreme Court observed, what "differentiates sex from such nonsuspect statuses as intelligence or physical disability . . . *is that the sex characteristic frequently bears no relation to ability to perform or contribute to society.*" *Cleburne*, 473 U.S. at 440-41 (emphasis added) (quoting *Frontiero*, 411 U.S. at 686). Similarly, "[b]ecause illegitimacy is beyond the individual's control and *'bears no relation to the individual's ability to participate in and contribute to society,'* . . " any legislative distinction based on that characteristic must also be subjected to heightened scrutiny. *Cleburne*, 473 U.S. at 441 (emphasis added) (quoting *Lucas*, 427 U.S. at 505).

On the contrary, where a characteristic indeed has a direct bearing on the individual's ability to function in society, the Court has declined to grant the class suspect or quasi-suspect status. For example, in *Massachusetts Bd. of Retirement v. Murgia*, 427 U.S. 307 (1976), the Supreme Court was called upon to consider an equal protection challenge to a Massachusetts statute requiring

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lack of competence to review it. Thus, the Court has at least suggested this as another relevant consideration. *See Rodriguez*, 411 U.S. at 40-43; *Cleburne*, 473 U.S. at 442-3.

mandatory retirement for uniformed police officers at the age of 50. The rationale for mandatory retirement was "to protect the public by assuring physical preparedness of its uniformed police." *Id.* at 314 (footnote omitted).

The Court applied the rational basis test and found the statute did not violate the Equal Protection Clause. In declining to apply a heightened level of scrutiny, the court emphasized that "there is a general relationship between advancing age and decreasing physical ability . . . ." *Id.* at 310-11 (internal quotations omitted); *see id.* at 314-15, 314-15 n.7. The court further observed that,

> [w]hile the treatment of the aged in this Nation has not been wholly free of discrimination, such persons, unlike say, those who have been discriminated against on the basis of race or national origin, have not experienced a *history of purposeful unequal treatment* or been subjected to unique disabilities *on the basis of stereotyped characteristics not truly indicative of their abilities.*

Id. at 313 (internal quotations omitted) (emphasis added); *Cleburne*, 473 U.S. at 441.

Similarly, in *City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432 (1985), the Court was called upon to determine whether the mentally retarded should be granted quasi-suspect status. The Court observed that quasi-suspect status has been reserved for those groups whose defining characteristic is beyond the individual's control and bears no relation to the individual's ability to perform or to participate in, or contribute to, society. *See Id.* at 440-441 (citing *Frontiero*, 411 U.S. at 686 and *Lucas*, 427 U.S. at 505). In concluding that the Court of Appeals had erred in holding mental retardation a quasi-suspect classification, the Supreme Court repeatedly emphasized the fact that the mentally retarded have "a reduced ability to cope with and function in the everyday world." *Id.* at 442; *see id.* at 443, 444.

Thus, while mental retardation is immutable and beyond the individual's control, there is indeed, as the Court found, an

"undeniable" relationship between mental retardation and the individual's abilities. *Id.* at 442, 444. Legislation bearing on mental retardation, therefore is not presumptively invalid:

> Because mental retardation is a characteristic that the government may legitimately take into account in a wide range of decisions, and because both State and Federal Governments have recently committed themselves to assisting the retarded [beyond merely prohibiting discrimination against them], we will not presume that any given legislative action, even one that disadvantages retarded individuals, is rooted in considerations that the Constitution will not tolerate.

Cleburne, 473 U.S. at 446.

Thus, where the characteristic, like race, gender, illegitimacy or national origin, is determined by causes beyond the individual's control and bears no relation to the individual's ability to perform or to participate in, or contribute to, society and especially where the class has suffered a history of discrimination based on stereotyped notions of that characteristic, any legislation resting on such an irrelevant characteristic likely reflects nothing more than invidious stereotypes beyond the scope of any permissible governmental purpose.[15] While most legislation enjoys a presumption of constitutionality, *Heller v. Doe*, ___ U.S. ___, ___, 113 S.Ct. 2637, 2643 (1993), legislation based on invidious criteria is not entitled to that presumption and must be carefully scrutinized by the judiciary.

Thus in determining whether this Court should find that gays[,] lesbians and bisexuals constitute a quasi-suspect class

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[15] Thus, the Supreme Court has noted, "[s]ome classifications are more likely than others to reflect deep-seated prejudice rather than legislative rationality in pursuit of some legitimate objective." *Plyler v. Doe*, 457 U.S. 202, 216 n.14 (1982).

mandating heightened scrutiny of any legislation drawing a distinction based on sexual orientation, the court must consider:

> (1) whether an individual's sexual orientation bears any relationship to his or her ability to perform, or to participate in, or contribute to, society;
> (2) whether the members of the group have any control over their sexual orientation;
> (3) whether sexual orientation is an immutable characteristic;
> (4) whether that group has suffered a history of discrimination based on their sexual orientation; and
> (5) whether the class is "politically powerless."

Based on the record before the Court and our careful reading of the case law in this area, we conclude that sexual orientation is a quasi-suspect classification. Therefore, laws drawing a distinction based on that characteristic must be substantially related to a sufficiently important governmental purpose.

B

1

First, we conclude that gays, lesbians and bisexuals have suffered a history of invidious discrimination based on their sexual orientation. This is not a unique conclusion. *See High Tech Gays v. Defense Indus. Sec. Clearance Office.*, 895 F.2d 563, 573 (9th Cir. 1990); *Dahl v. Secretary of the United States Navy*, 830 F. Supp. 1319, 1324 n.7 (E.D.Cal. 1993); *see also, Rowland v. Mad River Local School District*, 470 U.S. 1009, 1014 (1985) (Brennan, J., dissenting from denial of *cert.*). Gays, lesbians and bisexuals have been stigmatized throughout history based on erroneous stereotypes and mischaracterizations regarding their sexual orientation. Gays, for example, have been characterized as effeminate mental defects with a proclivity

towards pedophilia, and a host of other deviant sexual practices.[16] Gays have been subjected to pervasive private discrimination as well as public discrimination on the local, state and federal levels.

Furthermore, homosexuality was long considered a mental illness--a notion since discarded by the medical community--amenable to aversion therapy, and other "treatments" now considered ineffective and unethical. Gays have been black listed and rooted out of government service and subjected to arrest and censorship and much more over the years. We conclude that it is a matter of fact beyond dispute that gays, lesbians and bisexuals have suffered a history of discrimination based on inaccurate, stereotyped notions of their sexual orientation.

2

We also conclude that sexual orientation, whether hetero[,] homo-, or bisexual, bears no relation whatsoever to an individual's ability to perform, or to participate in, or contribute to, society. *See Cammermeyer v. Aspin*, 850 F. Supp. 910, 922 (W.D. Wash. 1994) ("there is no study showing [homosexuals] to be less capable or more prone to misconduct." "[F]emale homosexual[s] in the Navy [are] hardworking, career-oriented, willing to put in long hours on the job and among the command's top professionals"). Indeed the American Psychological Association has so concluded, and no evidence was produced remotely indicating otherwise. If homosexuals were afflicted with some sort of impediment to their ability to perform and to contribute to society, the entire phenomenon of "staying in the Closet" and of "coming out" would not exist; their impediment would betray their status.

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[16] In fact ERNSR campaign literature accused homosexuals of habitually engaging in a wide range of activities, some of which allegedly involve the use of rodents, fists, and other objects. These inflammatory assertions were thoroughly rebutted by the Plaintiffs' expert, Dr. Conant.

3 & 4

Furthermore, we conclude that homo-, hetero-, and bisexual orientation is a characteristic beyond the control of the individual. Credible and unrebutted testimony established that sexual orientation sets in at an early age, around 3-5 years, and is simply a matter of development beyond that stage. Furthermore, evidence amply established, and we conclude, that there is a broad distinction between sexual orientation, and sexual conduct. *See, e.g., Cammermeyer*, 850 F. Supp. at 919-19 ("[p]laintiff has also provided the Court with substantial uncontroverted evidence that a distinction between homosexual orientation and homosexual conduct is well grounded in fact"). Sexual orientation, as Dr. Gonsiorek put it, "is a predisposition toward erotic, sexual, affiliation or affection relationship towards one's own and/or the other gender," and is not simply defined by any conduct. See Transcripts of Proceedings, Doc. 29(b), at 173-174. In fact, evidence demonstrated that sexual activity is not even necessarily a good predictor of one's sexual orientation.

Thus, while sexual conduct may be a matter of volition, sexual orientation is not. Sexual orientation is therefore not simply a matter of who one *chooses* to have sex with, but rather is a much deeper, more complex and involuntary state of being. We therefore conclude that sexual orientation is a characteristic not only beyond the control of the individual, but also one existing independently of any conduct that the individual, hetero-, homo- or bisexual, may choose to engage in. Furthermore, relevant and credible evidence revealed that sexual orientation is unamenable to techniques designed to change it, and that such techniques are considered unethical.

5

Finally, to the extent it is relevant, we conclude that Plaintiffs, while not a wholly politically powerless group, do suffer

significant political impediments.[17] First, while the evidence as

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[17] Throughout this litigation much attention has been focused on whether gays[,] lesbians and bisexuals are "politically powerless." While we recognize that the Supreme Court has touched upon this variable in several cases, it is by no means the controlling criteria in determining suspect or quasi-suspect status. Because, the "Equal Protection Clause protects against arbitrary and irrational classifications, and against invidious discrimination stemming from prejudice and hostility[,]" *Plyler v. Doe*, 457 U.S. 202, 245 (1982) (Burger, C.J., dissenting), whether a class is labeled "suspect" or "quasi-suspect" should not be controlled by, nor do we think the Supreme Court has ever held that it is controlled by, a group's ability to pass or fail some ill-defined political power test.

Additionally, relative political power cannot even be a particularly weighty factor, let alone a controlling one. For example, it cannot be said that males, as a group, have been relegated to such a position of political powerlessness as to require special judicial protection. Nonetheless, laws differentiating between the sexes which disadvantage males as well as females, must be subjected to heightened scrutiny. *See Mississippi Univ. for Women v. Hogan*, 458 U.S. 718, 723 (1982); *Craig v. Boren*, 429 U.S. 190, 204 (1976). Thus, the fact that gender is beyond the individual's control and is generally totally irrelevant must be far more controlling than any political power analysis. Similarly, if political power were the overriding factor, political gains by women and racial minorities could threaten their protected status.

Furthermore, the only cases this Court is aware of that gives some semblance of guidance as to what even constitutes a groups's relative political power are *Frontiero*, 411 U.S. 677 and *Cleburne*, 473 U.S. 432. In neither case did the Court explore whether the group involved had the ability to form coalitions or to what extent they contributed money to PACs. In *Frontiero*, for example, the Court noted the absence of women in this country's "decision making councils." 411 U.S. at 686, 686 n.17.

In *Cleburne*, the Court reviewed legislation designed to benefit the mentally retarded, noting that much state and federal legislation went beyond merely prohibiting discrimination against that group.

to whether gays, lesbians and bisexuals earn an income or have an educational level above that of the average American was inconclusive, evidence indicated that homosexuals earn an income roughly equal to that of the national average. Similarly, the amount of money spent on political action committees ("PACs") was also inconclusive. Much of the difficulty in compiling this data appears to stem from the reluctance of gays to risk exposure by responding to questions and identifying themselves as gay, lesbian or bisexual. In fact, it is this factor

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Cleburne, 473 U.S. at 443-45. The thrust of that analysis was not to explore the political power of the group as such, but rather to underline the error in the view that laws drawing a distinction on mental ability should be *presumed* invidious and therefore unconstitutional. The Court observed that in fact the opposite was true: "[I]n the vast majority of situations" the legislative response to the plight of the mentally retarded, both federal and state, has been both "legitimate [and] . . . desirable." *Id.* at 444. In order for a law to be subject to heightened scrutiny, it must have lost the general presumption that it is rational and legitimate. In the case of the mentally retarded, the "vast majority" of laws dealing with that group benefit them, going beyond merely prohibiting discrimination. The Court also discussed how mental retardation bore on an individual's abilities and was a legitim[ate] subject of legislation. It therefore defies logic and experience to *presume* that a law based on that criteria is unconstitutional.

Furthermore, in most cases the Supreme Court has no more than made passing reference to the "political power" factor without ever actually analyzing it. *See, e.g., Bowen v. Gilliard*, 483 U.S. 587, 602 (1987); *Massachusetts Bd. of Retirement v. Murgia*, 427 U.S. 307, 313 (1976); *San Antonio Ind. School Dist. v. Rodriguez*, 411 U.S. 1, 28 (1973). Thus, while these Courts have given the test differing degrees of attention, one thing is apparent to this Court: the significance of the test pales in comparison to the question of whether or not the characteristic bears any relationship to the individual's ability to function in society, whether the group has suffered a history of discrimination based on misconceptions of that factor and whether that factor is the product of the group's own volition.

which undermines the validity of the generally reliable United States Census report in this area for, as testimony established, the Census is not wholly anonymous. It is therefore not possible for the Court to determine the extent of the financial resources available to gays[,] lesbians and bisexuals as a group, and to what extent that money is dedicated to obtaining political results.[18]

On the other hand, undisputed evidence was offered demonstrating that gays, lesbians and bisexuals are confronted with distinct obstacles in the political arena. Testimony from both the Defendants' and the Plaintiffs' witness[es] demonstrated that it is crucial for political minorities to form coalitions in order to achieve legislative success. All groups are a minority on specific issues, and thus all groups must form coalitions in order to obtain beneficial legislation. As a result, groups that normally do not agree must get together to form coalitions. Evidence revealed that even those groups that need the help of gays, lesbians and bisexuals refuse to form coalitions with them because of their strong feeling of dislike for these groups. For these reasons, gay political power is seriously curtailed.

It is also significant that of 38 Issue 3-type ballot initiative campaigns waged in communities across the country, 34 were approved by the voters. According to one witness, the four that were not approved, simply "went beyond the pale" as far as their discriminatory effect on gays, lesbians and bisexuals. This not only bespeaks the level of hostility towards gays, but also the fact that whatever political gains they have made are in peril. Thus, whatever bonafide legislative victories gays, lesbians and bisexual[s] may have achieved in recent years, those victories are being "rolled back" at an unprecedented rate and in an unprecedented manner.[19]

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[18] There was also conflicting testimony on the ultimate impact PAC money has on lawmakers' actual votes.

[19] Indeed, Mr. Guckenberger testified at the hearing on the motion for preliminary injunction, that he knew of no other time in the history

Furthermore, openly gay, lesbian and bisexual individuals are almost entirely absent from the "Nation's decision making councils" as were women at the time of the *Frontiero* decision. *See Frontiero*, 411 U.S. at 686 n.17.[20] We thus conclude, to the extent that it is relevant to a group's suspect-or quasi-suspect status, gays, lesbians and bisexuals do not enjoy that type of legislative success, political representation, or political alliance[] building capability necessary to be considered a politically powerful group.

C

Finally, we acknowledge that numerous Courts of Appeals have ruled on the issue of whether sexual orientation should be accorded suspect or quasi-suspect status, and all have decided in the negative. We disagree, however, with the fundamental underpinning of those decisions--that homosexuality is a status defined by conduct--and therefore decline to follow their reasoning.

Several of these cases based their decision not to grant suspect or quasi-suspect status to homosexuals on the conclusion that *Bowers v. Hardwick*, 478 U.S. 186 (1986), posed an "insurmountable barrier[]" to such a holding. *Padula v. Webster*, 822 F.2d 97, 102 (D.C. Cir. 1987). In *Bowers*, the Supreme Court held that laws criminalizing homosexual sodomy did not run afoul of the Due Process Clause because there is no

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of the City of Cincinnati when such a charter amendment was enacted. See *Equality*, 838 F. Supp. at 1238.

[20] According to the Plaintiffs' statistics, there are 497,155 elected officials in the United States. There are no openly gay or lesbian United States Senators; 2 openly gay members of the House of Representatives; 12 of the 7,461 state legislators are openly gay; of the total of 497,155 elected officials in the United States, a total of 73 are openly gay.

fundamental right to engage in homosexual sodomy. *Bowers*, 478 U.S. at 191-192.

In light of *Bowers*, the D.C. Circuit concluded that,

> [i]t would be quite anomalous, on its face, to declare *status defined by conduct* that states may constitutionally criminalize as deserving of strict [or heightened] scrutiny under the equal protection clause. More importantly, in all those cases in which the Supreme Court has accorded suspect or quasi-suspect status to a class, the Court's holding was predicated on an unarticulated, but necessarily implicit, notion that it is plainly unjustifiable (in accordance with standards not altogether clear to us) to discriminate invidiously against the particular class. . . . If the Court [in *Bowers*] was unwilling to object to state laws that criminalize the *behavior that defines the class*, it is hardly open to a lower court to conclude that state sponsored discrimination against the class is invidious.

Padula, 822 F.2d at 103 (citations omitted) (emphasis added); *accord High Tech Gays v. Defense Indus. Sec. Clearance Office.*, 895 F.2d 563, 571-72 n.6, 573-74 (9th Cir. 1990) (emphasis added) (homosexuality is "*behavioral* and hence is fundamentally different from traits such as race, gender, or alienage, which define already existing suspect and quasi-suspect classes . . . . The *behavior or conduct* of such already recognized classes is irrelevant to their identification"); *Woodward v. United States*, 871 F.2d 1068, 1076 (Fed. Cir 1989), *cert. denied*, 494 U.S. 1003 (1990) (homosexuals held not suspect or quasi-suspect class because "[t]he *conduct or behavior* of the members of a recognized suspect or quasi-suspect class has no relevance to the identification of those groups" whereas "homosexuality is primarily *behavioral* in nature") (emphasis added); *Ben-Shalom v. Marsh*, 881 F.2d 454, 464-465 (7th Cir. 1989), *cert. denied, Ben-Shalom v. Stone*, 1004 (1990) ("[i]f homosexual conduct may constitutionally be criminalized, then homosexuals do not constitute a suspect or quasi-suspect class entitled to greater than rational basis scrutiny for equal protection purposes"). Because

we expressly reject the notion that homosexual orientation is "defined by" any conduct, we decline to adopt the reasoning of these courts.[21]

Rather, as discussed above, we conclude that sexual orientation, whether homosexual or heterosexual, exists independently of any conduct. Consequently, neither *Bowers*, nor the reasoning of *High Tech Gays, Woodward, Padula, Ben-Shalom*, nor any of the other cases similarly ruling, is controlling. *Bowers*, therefore, does not preclude a finding that gays, lesbians and bisexuals constitute a quasi-suspect class.

Accordingly, based on the forgoing, we conclude that gays, lesbians and bisexuals meet the requisite criteria for quasi-suspect status. Thus, laws drawing a distinction based on sexual orientation must be subjected to intermediate scrutiny. Issue 3 therefore, must be substantially tailored to a sufficiently important governmental interest or it is unconstitutional.

V

RATIONAL BASIS

The Plaintiffs also assert that under the rational basis test, Issue 3 must be declared unconstitutional. For the reasons that follow, we agree. "The equal protection clause of the Fourteenth

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[21] Although several other cases pre-dated *Bowers*, they based their decision not to grant quasi-suspect status to homosexuals on essentially the same point we reject. *See Baker v. Wade*, 769 F.2d 289, 292 (5th Cir. 1985) (en banc) ("[b]ecause . . . homosexual conduct is not a constitutionally protected liberty interest . . . we refuse to hold[] that homosexuals constitute a suspect or quasi-suspect classification"); *National Gay Task Force v. Bd. of Educ.*, 729 F.2d 1270, 1273 (10th Cir. 1984), *aff'd by equally divided Court*, 470 U.S. 903 (1985)("[w]e cannot find that a classification based on the choice of sexual partners is suspect"); *Rich v. Secretary of Army*, 735 F.2d 1220, 1229 (10th Cir. 1984) (same).

Amendment commands that no State shall 'deny to any person within its jurisdiction the equal protection of the laws,' which is essentially a direction that all persons similarly situated should be treated alike." *City of Cleburne v. Cleburne Living Ctr, Inc.*, 473 U.S. 432, 439 (1985) (citing *Plyler v. Doe*, 457 U.S. 202, 216 (1982)). Furthermore, while under the rational basis test, the courts must accord legislatures great deference, and in fact the legislature is presumed to have acted constitutionally, *Heller v. Doe*, ___ U.S. ___, ___, 113 S.Ct. 2637, 2643 (1993), "[t]he State may not rely on a classification whose relationship to an asserted goal is so attenuated as to render the distinction arbitrary or irrational." *Cleburne*, 473 U.S. at 446, (citing *Zobel v. Williams*, 457 U.S. 55, 61-63 (1982) and *United States Department of Agriculture v. Moreno*, 413 U.S. 528, 535 (1973)); *Bannum. Inc. v. City of Louisville*, 958 F.2d 1354, 1360 (6th Cir. 1992). Therefore, although a classification must be upheld under the rational basis standard if there is any reasonably conceivable state of facts that could provide a rational basis for the classification, "even the standard of rationality . . . must find some footing in the realities of the subject addressed by the legislation." *Heller*, ___ U.S. at ___, 113 S.Ct. at 2643.

Therefore, "some objectives--such as a bare . . . desire to harm a politically unpopular group--are not legitimate state interests." *Cleburne*, 473 U.S. at 446-47 (internal quotation and citation omitted); *Moreno*, 413 U.S. at 534. Consequently, "mere negative attitudes, or fear," of a given group, will not suffice as a legitimate governmental purpose. *Cleburne*, 473 U.S. at 439. Finally, while the Constitution cannot control private prejudice[s], "neither can it tolerate them. Private biases may be outside the reach of the law, but the law cannot, *directly or indirectly*, give them effect." *Palmore v. Sidoti*, 466 U.S. 429, 433 (1984) (emphasis added).

After carefully considering the asserted governmental interests articulated by the Defendants, and any other possible justifications, we conclude that Issue 3 is not rationally related to any legitimate governmental purpose. Thus, Issue 3 runs afoul of the Equal Protection Clause.

VI

ANALYSIS

The Defendants have identified several governmental purposes which they claim to be, at minimum, legitimate, and to which Issue 3 is rationally related. First, the Defendants claim that the government always has an interest in not imposing regulations upon private citizens. Thus, the argument goes, by removing regulations that would give the Plaintiffs any kind of protected status, Issue 3 serves the purpose of not regulating private conduct any more than necessary.

Second, the Defendants claim[] that Issue 3 serves the legitimate governmental purpose of saving scarce resources, both public and private. Third, the Defendants urge that Issue 3 serves the purpose of "not imposing a uniform, doctrinaire view concerning the moral relevance of homosexual behavior on all segments of the community." Thus, according to the Defendants, "by refraining from dictating one government-mandated view concerning the relevance of sexual orientation, Issue 3 promotes diversity by allowing different groups in the community to hold divergent views on this question."

Fourth, the Defendants claim that Issue 3 gives legal effect to Cincinnati's collective notion of morality. The Defendants also claim that Issue 3 serves the purpose of protecting and nurturing the nuclear family. Finally the Defendants maintain that Issue 3 advances democracy and political integrity by allowing the citizens to make this important decision for themselves and preserving their ability to define and limit the powers of their elected representatives.

A

1 & 2

Assuming *arguendo* that the governmental interests in saving resources and minimizing governmental regulation are legitimate

governmental interests, in this case they are not sufficient to justify Issue 3's sweeping prohibitions. First, evidence was offered demonstrating that any money and resources that might be saved by Issue 3's elimination of any and all laws prohibiting discrimination against homosexuals, would be, at best, *de minimis*. Testimony established that time and resources allocated to the sexual orientation provision of the HRO and the EEO is not only minimal but that it does not diminish the City's capacity to enforce existing anti-discrimination provisions regarding the traditional suspect and quasi-suspect classifications (as well as the non-traditional classifications protected by the HRO and the EEO such as Appalachian origin, marital status and heterosexual orientation).

Similarly, evidence established that the inclusion in the EEO and the HRO of the sexual orientation provision would not require the expenditure of additional funds, nor require additional staff or resources. Additionally, one credible witness testified that Issue 3 could even cost the city scarce resources by barring Cincinnati's eligibility for certain types of state and federal programs.

Furthermore, the elimination of the sexual orientation provisions of the HRO and the EEO would not reduce regulation more than a negligible amount at best, because of the existing regulations in the HRO and the EEO, including those regulations pertaining to race, gender, heterosexual orientation, Appalachian origin and marital status. Thus, Issue 3's broad prohibition of all gay rights legislation is too attenuated to these asserted interests. Thus, Issue 3's distinction is arbitrary and irrational. *See Cleburne*, 473 U.S. at 446.

Consequently, under strict or heightened scrutiny, the asserted goal must also fail. Even assuming that some savings could be derived if sexual orientation were not included in the HRO and EEO, a simple repeal could have accomplished this goal. Therefore, the asserted governmental interest of reducing regulation and saving resources is neither narrowly tailored, nor,

substantially related to either a compelling or sufficiently important governmental purpose.

3

Furthermore, the Defendants assert that Issue 3 serves the significant governmental interest of promoting the "nuclear family." While this asserted goal is certainly an honorable one, we conclude that it is not sufficiently related to Issue 3's universal, prospective ban on all legislation and policy prohibiting discrimination against gays, lesbians and bisexuals to pass constitutional muster.

First, as the Defendants own witness testified, there is no consensus as to a definition of "family" and that more than one definition exists. Furthermore, testimony from both the Plaintiffs' and Defendants' witnesses established that heterosexual males are far more responsible than gays in this society for the break down of the family unit. According to the evidence, this is due, at least in part, to the increased illegitimacy rate and the failure of heterosexual males to remain with the mother and care for, and help raise their children. Furthermore, testimony from both sides demonstrated that divorce is also a great factor contributing to the breakdown of the "nuclear family." Nonetheless, the EEO and HRO continue to prevent discrimination on the basis of marital status.

Additionally, no evidence was produced to explain how Issue 3 could protect the "nuclear family." In fact, the best explanation offered by the Defendants' witness was that Issue 3 would preserve the "potential" for passing laws that could benefit the family. We are, however, unaware of how *allowing* the City Council to prohibit discrimination against gays, lesbians and bisexuals undermines the family or prevents the enactment of "pro-family" legislation. As the trial court in *Evans v. Romer* observed, "[s]eemingly, if one wished to promote family values, action would be taken that is pro-family, rather than anti some other group." 1993 WL 518586, *8 (Colo. Dist. Ct. Dec. 14, 1993). Thus, removing gays from the list of groups protected

from discrimination and barring passage of any such legislation in the future, is simply too remote from the accomplishment of the asserted goal of nurturing the "nuclear family" to give Issue 3 so[] much as a rational basis. *See Cleburne*, 473 U.S. at 446.

4

The Defendants also argue that Issue 3 serves the purpose of "not imposing a uniform, doctrinaire view concerning the moral relevance of homosexual behavior on all segments of the community" and thereby promotes ...versity of views on this question. We disagree. In fact, we conclude that Issue 3 accomplishes exactly the opposite.

While the mere absence of a law prohibiting discrimination on the basis of sexual orientation could arguably reflect governmental neutrality on the issue, Issue 3 is an affirmative statement to the City Council and city administration, and to all of the citizens of Cincinnati, that discrimination against homosexuals shall be permitted, and in all likelihood, shall never be prohibited no matter what the circumstances. In fact, Issue 3, as a provision of the Cincinnati City Charter, makes the statement "homosexuality is wrong" one of the city's fundamental tenets. Such a governmental edict has the precise effect of "imposing a uniform, doctrinaire view concerning the moral relevance of homosexual behavior on all segments of the community." Thus, by its very terms, not only is Issue 3 not rationally related to the asserted governmental interest[] of promoting diversity of views on this topic, but it utterly frustrates it.

Furthermore, anti-discrimination legislation does not impose a point of view upon the community, but rather affects behavior. Thus, a law prohibiting discrimination based on sexual orientation neither requires anyone to *think* a certain way, nor adopt a given point of view about the moral relevance of homosexuality. Rather, it simply affects conduct the same way laws prohibiting discrimination against any other group affects conduct (but not beliefs). Additionally, the enactment of laws preventing discrimination against a particular group in private

employment and housing, does not interfere with any individual's constitutional rights regarding personal relationships. *See Roberts v. United States Jaycees*, 468 U.S. 609, 620 (1984).

There is, therefore, absolutely no relationship between Issue 3's universal prospective ban on the passage of anti-discrimination laws and the asserted governmental purpose of promoting diversity of views and preventing the imposition of a uniform doctrinal view on all segments of the community. Issue 3 is not only too attenuated from that asserted goal, but it achieves the opposite effect.

5

Similarly, the Defendants claim that Issue 3 gives effect to Cincinnati's collective notion of morality. While this alone is not necessarily an illegitimate governmental purpose, *see Bowers v. Hardwick*, 478 U.S. 186, 196 (1986), it cannot simply be a surrogate for the majority's desire to discriminate against an unpopular minority group. *See Cleburne*, 473 U.S. at 446-47. "[M]ere negative attitudes, or fear," of a given group, will not suffice as a legitimate governmental purpose. *See Id.* at 448.

According to Mark McNeil, coordinator of the Issue 3 campaign, ERNSR's own polls showed that Cincinnati's voters did not understand the language of Issue 3. Furthermore defense witnesses expressed varying, and at times inconsistent, views as to its scope. Thus, considering the confusing language of Issue 3, its uncertain, although clearly sweeping scope, and the lack of any legislative history, it is simply impossible to ascertain what, if any, collective notion of morality Cincinnati has. Furthermore, in light of the grossly inaccurate campaign ads and other materials available to the voters through the media, mailings, and other sources, it is impossible to know exactly what the voters intended to vote for.[22] It is thus impossible to know what, if any,

[22] For example, the Defendants consistently portrayed Issue 3 as a mere repeal measure which all parties concede it is not. Furthermore,

Cincinnati's "collective notion of morality" is. This asserted purpose is likewise insufficient to justify Issue 3.

B

Furthermore, the very structure of Issue 3, its sweeping scope, and its distinct focus on prospectively barring any *anti-discrimination* legislation, policy or regulation, on behalf of gays, lesbians and bisexuals bespeaks [its] "bare. . . desire to harm a politically unpopular group . . . ." *United States Department of Agriculture v. Moreno*, 413 U.S. 528, 534 (1973) (emphasis in original); *Cleburne*, 473 U.S. at 446-47. Such an objective can never "constitute a *legitimate* governmental interest." *Moreno*, 413 U.S. 528 at 534 (emphasis in original); *Cleburne*, 473 U.S. at 446-47.

It is true that legitimate governmental purposes can, and have been, articulated in support of Issue 3. However, we can conceive of no legitimate governmental purpose *rationally related* to a law which prohibits a minority group from *ever* obtaining anti-discrimination legislation on its behalf, unless it undertakes the massive and unmitigated--and likely insurmountable--burden of amending the city charter. Such a law implies nothing more than a "bare desire to harm an unpopular group" based on who the members of that group are. The purpose not only to permit discrimination, but also to encourage it, is inherent in the very concept of such a law. As such it is constitutionally defective. *Moreno*, 413 U.S. at 534; *Cleburne*, 473 U.S. at 446-47.

C

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what was ostensibly being repealed were "special rights" for gays which that group has theoretically received *over and above* those enjoyed by other groups. In fact many other non-traditionally suspect groups enjoy not only local, but federal and state protections beyond those given to gays.

Finally, Issue 3, far from demonstrating governmental neutrality on the issue of homosexuality, in fact, gives effect to private prejudice. This, the constitution will not tolerate. *Palmore v. Sidoti*, 466 U.S. 429, 433 (1984). As mentioned above, Issue 3 singles out gays, lesbians and bisexuals and prospectively and universally bars the passage of any and all laws or policies falling within the virtually boundless definition of "protective legislation" or "preferential treatment" for those citizens.

Such a strong message from the government, embodied in the City's fundamental law, effectively places the government's imprimatur on those acts of private bias carried out pursuant to Issue 3's unmistakable mission. Were the government silent on this issue, it could be argued that the government were neutral. Issue 3, however, is not mere governmental silence; it is an affirmative declaration that gays, lesbians and bisexuals are unworthy of protection, now and in the future. It is a declaration that discrimination against them is permissible, and that if they suffer discrimination at the hands of the majority, it is from the majority itself that they must seek help.

Thus, while the Constitution cannot control private prejudices, "neither can it tolerate them. Private biases may be outside the reach of the law, but the law cannot, *directly or indirectly*, give them effect." *Palmore*, 466 U.S. at 433 (emphasis added). In light of our conclusion regarding Issue 3's sweeping scope, we find that Issue 3 indeed gives effect, at the very least indirectly, to private prejudice. It is therefore constitutionally defective.

We therefore conclude that Issue 3 is unconstitutional under even the most deferential standard of review, let alone the most exacting.

VII

FIRST AMENDMENT AND VAGUENESS CLAIMS

The Plaintiffs have also made a number of claims based on the First Amendment. Additionally, the Plaintiffs argue that Issue 3 is unconstitutionally vague. First, the Plaintiffs claim that Issue 3 infringes their First Amendment rights to free speech and association. The Plaintiffs also claim that Issue 3 infringes their First Amendment right to petition the Government for a redress of grievances. For the following reason[s], we agree.

A

Free Speech and Association

The First Amendment provides that Congress "shall make no law . . abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." U.S. Const. amend. I. "[F]reedom of speech. . . [is] among the most fundamental personal rights and liberties which are secured to all persons by the Fourteenth Amendment against abridgment by the States." *Thornhill v. Alabama*, 310 U.S. 88, 95 (1940) (footnote omitted); *Meyer v. Grant*, 486 U.S. 414, 420 (1988).

"The First Amendment was `fashioned to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people.'" *Meyer*, 486 U.S. at 421 (citing *Roth v. United States*, 354 U.S. 476, 484 (1957)). Thus, "[t]he freedom of speech . . . guaranteed by the Constitution embraces at the least the liberty to discuss publicly and truthfully all matters of public concern without previous restraint or fear of subsequent punishment." *Thornhill*, 310 U.S. at 101-02 (footnote omitted); *Meyer*, 486 U.S. at 420. Additionally, "`statutes that limit the power of the people to initiate legislation are to be closely scrutinized and narrowly construed.'" *Meyer*, 486 U.S. at 420 (quoting *Urevich v. Woodard*, 667 P.2d 760, 763 (Colo. 1983)). Finally, "constitutional violations may arise from the deterrent, or `chilling,' effect of governmental regulations that fall short of a direct prohibition against the exercise of First Amendment rights." *Laird v. Tatum*, 408 U.S. 1, 11 (1972).

First, as we have stated, Issue 3 not only repeals the existing prohibition against discrimination against gays, lesbians and bisexuals, but it is undisputed that it forever bars City Council from ever enacting any law[,] policy[,] regulation [or] ordinance of any kind that would protect gays from discrimination,¬no matter what the need, no matter how exigent the circumstances. Thus, as we found in *Equality*, Issue 3[] eviscerates the very purpose of gays, lesbians and bisexuals, or their organizations, lobbying or petitioning City Council or [the] city administration, or attempting to gain access to those bodies. 838 F.Supp. at 1238. Consequently, there is a significant deterrent for gays, lesbians and bisexuals to get involved in political activities of major importance to the group.

Furthermore, again, as we noted in *Equality*,

> not only will gay, lesbian and bisexual citizens be virtually unable to obtain legislation for their group no matter how great the need, but also their advocacy may expose them to discrimination for which they will have no recourse even remotely comparable to that of other groups, to obtain protection, thereby increasing the risks of, and consequently chilling, such expression.

Id. at 1242 (footnote omitted). Clearly, forcing this group to attempt to obtain favorable legislation through the costly and burdensome charter amendment process, with its attendant risk of exposing them to virtually unremediable discrimination, will deter open discourse on the matter and chill expression and association of groups dedicated to bringing about such results. See *Id.* at 1242 n.5.

In light of the for[e]going, we conclude that Issue 3 will hinder the "unfettered interchange of ideas for the bringing about of political and social change[] . . . ." *Roth*, 354 U.S. at 484; *Meyer*, 486 U.S. at 421. Furthermore, because Issue 3 imposes upon the Plaintiffs the added burden of attempting to amend the charter every time they seek legislation, Issue 3 unquestionably limits the power of that group to initiate legislation and therefore must be

closely scrutinized and narrowly construed. *See Meyer*, 486 U.S. at 420.

This does not mean that gays, lesbians and bisexuals are entitled to *successful* lobb[y]ing for favorable legislation. There is however, an undeniable and singular deterrent from joining groups, speaking out, or lobbying for, or advocating, the adoption of favorable policy or legislation, or supporting groups or candidates that support certain political beliefs. As such Issue 3 clearly "limit[s] the power of the people to initiate legislation . . . " and must face exacting scrutiny. *Meyer*, 486 U.S. at 420 (internal quotation omitted).

Furthermore, because the charter amendment process is so much more onerous than lobbying City Council for legislation, gays will be virtually guaranteed that they will not be successful. While this alone may not be sufficient to render Issue 3 unconstitutional, and while gays, lesbians and bisexuals are not *entitled* to anti-discrimination legislation, there is an added factor which renders it violative of the First Amendment.

Issue 3 differs inherently from issues which may properly be relegated to the charter amendment process. As discussed above, Issue 3 bars City Council and [the] city administration from enacting any legislation or policy on behalf of gays, lesbians and bisexuals including anti-discrimination legislation. In order to obtain such legislation, gays, lesbians and bisexuals must seek a charter amendment. Unlike neutral issues which may permissibly be relegated to the initiative process,[23] unsuccessful proponents of a "repeal issue 3" campaign, through their political efforts, will open themselves to the risk of government condoned employment and housing discrimination for which all future avenues of recourse will be closed. An unsuccessful proponent of some neutral issue which must be approved by charter amendment, on the other hand, does not run the risk of suffering discrimination in employment and housing for taking part in, or supporting, that

[23] *See, e.g., Gordon v. Lance*, 403 U.S. 1 (1971).

issue. Rather he or she simply risks a political disappointment on that single issue.

Thus, the consequences of attempting to supersede Issue 3 are prohibitive of any attempt to do so, carrying with defeat--a likely consequence due to the Plaintiffs' numerical inferiority and unpopularity--the exorbitant risk of employment and housing discrimination. The social and political stakes associated with requiring an unpopular group to seek anti-discrimination legislation from the majority, therefore, are unique and patently unfair. Such a situation will chill political expression in a way and to a degree not inherent in other subjects properly relegated to the initiative process. This will have the "inevitable effect of reducing the total quantum of speech on a public issue[,]" *Meyer*, 486 U.S. at 423, and will deter political association in violation of the First Amendment. *See Equality*, 838 F. Supp. at 1242, 1242 n.5.

It is also noteworthy that in *Meyer*, the "Appellants argue[ed] that even if the statute imposes some limitation on First Amendment expression, the burden is permissible because other avenues of expression remain[ed] open to appellees . . . . " *Meyer*, 486 U.S. at 424. The Court held that the mere fact that other avenues of expression were available did not remedy the Constitutional defects of the statute because the statute restricted access to the most effective and perhaps the most economic avenue of political discourse. *Id.* Thus in *Meyer*, the fact that the statute left open the more burdensome avenues did not relieve the pressure on protected First Amendment expression. *Id.*

In this case, not only is the cost of the charter amendment process incomparably higher and the effort incomparably more onerous, but the political and personal consequences are far higher than merely lobbying the City Council, although political success even at the City Council level is not guaranteed. But similar to the principles enunciated in *Meyer*, the fact that a far more onerous avenue remains open to the Plaintiffs, does not neutralize Issue 3's constitutional defects. *see Meyer*, 486 U.S. at

424. Thus, Issue 3's enormous deterrent effect on political speech and association, renders it unconstitutional.

B

Redress

The Plaintiffs also claim that Issue 3 infringes the Plaintiffs' First Amendment Right to petition the government for redress of grievances. First, it is beyond dispute that under Issue 3 the Plaintiffs would be left without the option of lobbying City Council for legislation on their behalf. The Defendants argue, however, that the Plaintiffs still have the option of amending the city charter. This alternative, the Defendants claim, is nothing short of what the Defendants did in enacting Issue 3 in the first place. We find this argument unpersuasive. For the following reasons we conclude that Issue 3 deprives the Plaintiffs of their rights to petition the government for redress of grievances.

A party seeking to amend the Cincinnati City Charter, as a general rule, has two options. Under the Ohio Constitution, proposed

> [a]mendments to any charter . . . may be submitted to the electors of a municipality by a two-thirds vote of the legislative authority thereof, and, upon petitions signed by ten per centum of the electors of the municipality setting forth any such proposed amendment, shall be submitted by such legislative authority.

Ohio Const. art. XVIII, §9. Thus, as a general rule, those seeking to amend the Cincinnati city charter have two alternatives. They may seek a two thirds vote of the City Council to pass an "ordinance of submission" submitting a proposed charter amendment to the electorate. *See State ex rel. Kittel v. Bigelow*, 138 Ohio St. 497, 497, 502 (1941); *State ex rel. Citizens v. Widman*, 66 Ohio App. 3d 286, 288 (1990). They may also attempt to obtain sufficient signatures from the electorate, which, after submission to the City Council, may also be submitted to the

electorate. These two alternatives are wholly separate, *see Bigelow*, 138 Ohio St. at 502; *Widman*, 66 Ohio App. 3d at 288, and are the only two avenues available for amending the city charter. In the second scenario, a writ of mandamus may issue compelling the city Council to submit the proposal to the electorate if the City Council abuses its discretion in declining do so. *Bigelow*[,] 138 Ohio St. at 503, 540.

If the Plaintiffs chose to pursue the first option, they would have to petition the City Council to propose and adopt by a two-thirds vote, and "provide by ordinance," a proposed charter amendment repealing Issue 3 and reinstating employment and housing protection for gays, lesbians and bisexuals. *See Widman*, 66 Ohio App. 3d 286, 288 (1990); *Bigelow*, 138 Ohio St. at 502. Such City Council action, we conclude, falls within Issue 3's sweeping restrictions on City Council's authority in this area. This avenue would require the City Council, with the help of the voters, to give homosexuals protected status or preferential treatment. Furthermore, even if the proposed charter were never approved, the enactment of such an ordinance by 2/3 of the City Council clearly bespeaks a favorable "policy" with respect to homosexuality. Thus, Issue 3's preemptive breadth cuts off yet another avenue of redress for the Plaintiffs which is available to all other citizens.

Under the second alternative, the Plaintiffs may present to the City Council a petition signed by ten per cent of the voters. The Defendants argue that Issue 3 would not prohibit the Plaintiffs from proceeding in this manner, because the City Council's role in such situations is purely ministerial. However, under this alternative, it is still the responsibility of the City Council to "provide by ordinance" the proposal to the electors. *Blackwell v. Bachrach*, 166 Ohio St. [301], 306 [(1957)]; *Widman*, 66 Ohio App. 3d at 288.

Moreover, while it appears that the City Council's role in this regard *is* ministerial, *see Widman*, 66 Ohio App. 3d. at 291, our reading of Issue 3 reveals no exceptions for even purely ministerial functions which would consist of enacting an

ordinance which would have the ultimate effect of providing gays, lesbians and bisexuals with protected status or preferential treatment. This option, as well, would not be available to the Plaintiffs under Issue 3.

Additionally, even if this one avenue remained open to the Plaintiffs, that alone would not be enough to cure Issue 3's constitutional defects. First, if Issue 3 did not prohibit City Council action under the second option, in the event that the City Council erroneously interpreted Issue 3's broad language as prohibiting such action, the Plaintiffs would be required to seek a writ of mandamus. *See Bigelow* 138 Ohio St. at 503, 540, 37 N.E. 2d 41. Even assuming the writ issued in such a case, the Plaintiffs would have been required to tackle yet another resource consuming hurdle in an already arduous process.

Furthermore, even if this path were open to the Plaintiffs, this is clearly the narrowest, and most burdensome path to take in pursuing legislation. Thus, not only would the right to directly petition the City Council be cut off from the Plaintiffs, but so would at least one of the two avenues of the charter amendment process. While it is uncertain exactly what effects [I]ssue 3 would have on the second charter amendment alternative, it is clear that even if that single path remained unobstructed, the Plaintiffs would be acutely deprived of their right to petition the government for a redress of grievances.

Finally, because Issue 3 bars direct City Council legislation as well as the first of the two charter amendment options, with only the second of the two charter amendment options even arguably left open, Issue 3's chilling effect is drastically intensified. Consequently, we conclude that Issue 3 violates the Plaintiffs' First Amendment rights to free speech and association, and to petition the government for a redress of grievances.[24]

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[24] Such added obstacles to the political process bolsters this Court's conclusion that Issue 3 unconstitutionally "fences out" the Plaintiffs from the political process. See Part III, above.

C

Vagueness

The Plaintiffs also allege that Issue 3 is unconstitutionally vague in violation of the Due Process Clause of the Fourteenth Amendment because its effect, particularly on the Human Rights Ordinance, is unclear. Legislation must be sufficiently clear to satisfy the constitutional requirements of due process. "It is a basic principle of due process that an enactment is void for vagueness if its prohibitions are not clearly defined." *Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972).

As the *Grayned* Court observed, vague laws are offensive for several reasons, first,

> because we assume that man is free to steer between lawful and unlawful conduct, we insist that laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly. Vague laws may trap the innocent by not providing fair warning. Second, if arbitrary and discriminatory enforcement is to be prevented, laws must provide explicit standards for those who apply them.

Grayned, 408 U.S. at 108 (footnotes omitted); *Hoffman Estates v. Flipside, Hoffman Estates*, 455 U.S. 489, 498 (1982); *Springfield Armory, Inc. v. City of Columbus*, Nos. 92-4126/4223 slip. op. at 2 (6th Cir. July 11, 1994) [29 F.3d 250, 251-52]; *Planned Parenthood Ass'n v. City of Cincinnati*, 822 F.2d 1390, 1399 (6th Cir. 1987). Additionally, where a vague statute touches upon "sensitive areas of basic First Amendment freedoms," it operates to inhibit the exercise of those freedoms. *Grayned*, 408 U.S. at 109 (internal quotation omitted). Similarly, as the Sixth Circuit observed just weeks ago, when "criminal penalties are at stake, as they are in the present case, a relatively strict test is warranted." *Springfield Armory*, slip. op. at 3 [29 F.3d at 253] (citing *Hoffman Estates*, 455 U.S. at 499).

Confusion surrounding Issue 3's scope and impact was abundant at trial and otherwise on the record. In fact, the Defendants' own witnesses offered differing views regarding Issue 3's scope. For example, Chris Finney, an attorney who drafted Issue 3, admitted testifying at deposition that Issue 3 would void the entire HRO. At trial, he maintained that it would remove the sexual orientation provision from the ordinance. Mark McNeil, coordinator for the Issue 3 campaign, on the other hand, testified that Issue 3 did not remove "sexual orientation" from the HRO but removed only protections for lesbians, gay men and bisexuals.

It is not surprising that the intervening Defendants offered conflicting interpretations of Issue 3's effect, at times arguing that Issue 3 removes all sexual orientation-based protections and at other times urging that Issue 3 draws a distinction between protections available to gays, lesbians and bisexuals and those available to heterosexuals. On its very face, Issue 3 lends itself to contradictory interpretations.

First, its title suggests an interpretation of its scope which would extend to all laws granting protections based on sexual orientation, whether homosexual or heterosexual. The body of Issue 3, however, indicates that existing sexual orientation provisions are still in effect with regard to heterosexuals. Further ambiguities are found in its reference to homosexual "orientation, status, conduct or relationship" without ever offering a definition of such terms which could unquestionably cover a remarkably broad field of activities.

In fact, evidence in this case has established that the Plaintiff, H.O.M.E., and other employers subject to the HRO, will be unable to determine what effect Issue 3 will have on the HRO. Because the ordinance contains civil and criminal penalties for non-compliance, Issue 3 exposes H.O.M.E. and other employers to criminal penalties without fairly apprising them of its impact on their employment obligations. For example, H.O.M.E. does not know whether it can hire a lesbian over a heterosexual person solely on the basis of sexual orientation, or whether it will face a

civil and criminal penalty for doing so. Such agencies and other employers and property owners are vulnerable to penalties despite good faith efforts to comply with the law.

Furthermore, in *Grayned*, the Court observed that vague statutes "inevitably lead citizens to steer far wider of the unlawful zone . . . than if the boundaries of the forbidden areas were clearly marked." 408 U.S. at 109 (citations and internal quotations omitted). If Issue 3 does not prohibit discrimination based on heterosexual orientation or conduct, those who steer clear of such lawful conduct by so discriminating, have a more restrictive life imposed upon them than the law requires, due to the law's own ambiguities. If Issue 3 does prohibit such discrimination, as noted above, those who are not put on proper notice risk criminal penalties without fair warning. We find that Issue 3 does not give employers, landlords and others fair notice as to whether heterosexuals are protected against discrimination based on sexual "orientation, status, relationship or conduct."

Issue 3 can also lead to discriminatory enforcement. In *Grayned*, the court stated, "[a] vague law impermissibly delegates basic policy matters to policemen, judges and juries for resolution on an *ad hoc* and subjective basis, with the attendant dangers of arbitrary and discriminatory application." 408 U.S. at 108-09 (footnote omitted). Issue 3 does not provide the city with "explicit standards for those who apply" it. *Id.* at 108. With the ambiguous scope of Issue 3, decisions to enforce the HRO with respect to heterosexuals only may be conducted on an *ad hoc* basis. While Issue 3 obviously sweeps broadly, its full impact is uncertain. As a result, the citizens affected by this legislation are left vulnerable to discriminatory enforcement.

Finally, the void-for-vagueness doctrine also relates to legislation that limits conduct protected by the First Amendment. Indeed, where "the law interferes with the right of free speech or of association, a more stringent vagueness test should apply." *Hoffman Estates v. Flipside, Hoffman Estates*, 455 U.S. 489, 499 (1982) (footnote omitted). Issue 3 clearly involves rights associated with free speech and association as discussed above.

And because the full extent of Issue 3's scope is unclear, citizens, are likely to be discouraged from engaging in expressive and associational activities to obtain passage of legislation, due to the uncertainty of Issue 3's broad, yet ill-defined scope. Issue 3, therefore, is unconstitutionally vague.

CONCLUSION

This has been an extremely profound and controversial case. The Court has endeavored to thoroughly address and analyze each of the claims and assertions advanced by the parties. In light of the length of our opinion, we have summarized below our conclusions set forth in detail in the for[e]going opinion.

We conclude that Issue 3 indeed infringes the Plaintiffs' fundamental right to equal access to the political process. As such, this Court was obligated to subject Issue 3 to strict scrutiny review. We also hold that gays, lesbians and bisexuals belong to a quasi-suspect category, thus requiring the application of heightened scrutiny analysis to Issue 3. Based on the record and our analysis of the case law, we find that under strict or heightened scrutiny as well as under rational basis review, Issue 3 was insufficiently linked to any governmental interest to pass constitutional muster.

With respect to the Plaintiffs' First Amendment claims, we hold that Issue 3 violates the Plaintiffs' First Amendment rights to free speech and association, and to petition the government for a redress of grievances. Finally, we hold that Issue 3 is unconstitutionally vague.

Accordingly, for the forgoing reasons, we GRANT the Plaintiffs['] request for a permanent injunction, and hereby PERMANENTLY ENJOIN the implementation and enforcement of the proposed charter amendment known as Article XII or Issue 3.

SO ORDERED.

Dated August 9, 1994

S. Arthur Spiegel
United States District Judge

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

EQUALITY FOUNDATION OF GREATER CINCINNATI, INC. et al.,	:	C-1-93-773
Plaintiffs,	:	*ORDER GRANTING PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION*
v.	:	
THE CITY OF CINCINNATI, Defendant.	:	

This matter is before the Court on the Plaintiffs' Motion for Preliminary Injunction (doc. 2), the Defendant's Memorandum in Opposition (doc. 5), the Plaintiffs' Reply Memorandum (doc. 7), the Plaintiffs' Proposed Findings of Fact and Conclusions of Law (doc. 9), Brief of *Amicus Curiae* of Ohio Human Rights Bar (doc. 12), the Defendant's Proposed Findings of Fact and Conclusions of Law (doc. 13), Brief of *Amici Curiae* Ohio Sociological Foundation (doc. 14), and the Plaintiffs' Supplemental Reply (doc. 15). A hearing was held on this matter on November 15, 1993.

INTRODUCTION

We announced on November 16, 1993, our intention of granting the Plaintiffs' Motion for Preliminary Injunction. We emphasize that we are sensitive to the concerns of the people who voted in favor of the passage of the Issue 3 Amendment. It is of paramount concern to the Court that all effected by this Order have an understanding of the role of the Court in this case. The Court is in no way granting special rights to any individual or group, nor is it usurping the democratic process. On the contrary,

an essential principal of our system of government is that fundamental constitutional rights are not subject to popular vote. Thus, it is one of the most important roles of the federal courts to ensure that the constitutional rights of the few or the powerless are not infringed because their views are unpopular with the majority. Without these principals, and without the independence of the federal courts to preserve them, ours would not be a democracy at all but rather a tyranny at the whim of the majority.

PROCEDURAL BACKGROUND

The Plaintiffs in this case have filed a motion seeking a preliminary injunction prohibiting the implementation of the Issue 3 Amendment to the Cincinnati City Charter. Accordingly, we will analyze the issues before the Court under the appropriate four part test discussed below.

FACTUAL BACKGROUND

This action challenges the constitutionality of Article XII of the Cincinnati City Charter, passed by the voters on November 2, 1993. The Plaintiffs allege that the amendment violates their rights of equal protection, free speech, and redress of grievances guaranteed by the First and Fourteenth Amendments to the United States Constitution and by the Constitution of the State of Ohio.

The amendment, titled Issue 3 on the ballot ("Issue 3" or the "Issue 3 Amendment"), provides:

ARTICLE XII
NO SPECIAL CLASS STATUS MAY BE GRANTED BASED UPON SEXUAL ORIENTATION, CONDUCT OR RELATIONSHIPS

> The City of Cincinnati and its various Boards and Commissions may not enact, adopt, enforce or administer any ordinance, regulation, rule or policy which provides that homosexual, lesbian, or bisexual orientation, status,

> conduct, or relationship constitutes, entitles, or otherwise provides a person with the basis to have any claim of minority or protected status, quota preference or other preferential treatment. This provision of the City Charter shall in all respects be self-executing. Any ordinance, regulation, rule or policy enacted before this amendment is adopted that violates the foregoing prohibition shall be null and void and of no force or effect.

The Charter of the City of Cincinnati is akin to a local constitution. It is the primary governance document in the city. Generally, local laws must comply with the Charter. Policy in the Cincinnati City Government is set by a nine member City Council which is elected at large every two years; the council candidate receiving the highest vote is also elected Mayor.

Guy Guckenberger was a Republican council member for over twenty years. He left the Council in February, 1992 to assume a position as a Hamilton County Commissioner. Mr. Guckenberger testified for the Plaintiffs at the hearing and the Court found him to be a credible and informative witness. He explained that City Council not only passes laws but also does a great deal of constituent work, assisting citizens in their efforts to have particular problems addressed by the City administration. While the day-to-day administration of the City government is left to a professional city manager, the City Council enacts ordinances and sets policy for the city manager and City administration and also has the responsibility and authority to hire and fire the manager.

Mr. Guckenberger explained that council members have many particular constituencies within the Cincinnati electorate such as environmental groups, the AFL-CIO, and Stonewall--a political advocacy group for lesbians and gays. The determination of the competing needs and demands of various groups is accomplished by private meetings with citizens as well as through special public hearings and through the weekly council committee meetings.

Mr. Guckenberger and plaintiff Richard Buchanan, also a credible witness, traced the political development of the gay citizens of Cincinnati. In 1983, Stonewall Cincinnati first endorsed City Council candidates, although many of the candidates refused to accept the endorsement.

Over the years, the gay and lesbian issues pursued through City Council Members included alleged harassment of gays by police in the City Parks, a dispute with the Civil Service Commission regarding the questions on sexual orientation and sexual history for police and fire recruits, and the City EEO ordinance and what eventually became the Human Rights Ordinance.

Mr. Guckenberger noted that although the gay and lesbian political voice was getting stronger over the last decade, many individuals would nonetheless introduce themselves at gay functions by first name only and otherwise indicate that they were not yet ready to declare themselves openly gay.

The Plaintiffs also provided testimony to the effect that the political history of lesbians, gays and bisexuals in Cincinnati is an indication that they are an identifiable group. For example, George Chauncey, an historian at the University of Chicago, stated in his affidavit that there is a well-documented history of discrimination in the United States against gay men, lesbians and bisexuals as a result of their sexual orientation. This discrimination has included status-or identity-based discrimination as well as conduct-based discrimination. Many laws have been passed that have been specifically targeted at and/or selectively enforced against gay men, lesbians and bisexuals.

Furthermore, we found credible the testimony of Plaintiff Roger Asterino who testified at the hearing. He, along with Plaintiff Edwin Greene who testified via affidavit, related their experiences as gay men. Rita Mathis, another credible witness who also testified at the hearing, told of her experience as a lesbian. The testimony of these witnesses included accounts of

the discrimination they have experienced because of their sexual orientation. According to their testimony, they experience, among other things, fear of rejection by family and friends, fear of reprisal and violence and harassment in housing and employment.

Dr. Gonsiorek, a highly credentialed psychologist, testified credibly that the experiences of these plaintiffs were typical of the experiences of discrimination of lesbians, gay men and bisexuals. Dr. Gonsiorek showed that lesbians, gay men and bisexuals are an identifiable class because of their shared sexual orientation toward people of the same gender and their shared history of discrimination on the basis of their sexual orientation.

Plaintiff Mr. Asterino, who is 42, testified that he knew by an early age that he was gay and that he prayed to change. He was reluctant to "come out" to his family and co-workers and "came out" only this year to fight alleged sexual orientation discrimination at his job. Similarly, Plaintiff Ms. Mathis described her experience of discrimination as an African-American lesbian mother. Ms. Mathis cited instances of sexual orientation discrimination in her life and her fears not only for herself but for stigmatization or harassment of her son.

The Plaintiff Mr. Greene similarly testified via affidavit with respect to his experience of discrimination as an African-American gay man. Mr. Greene repeatedly experienced discrimination in employment prior to passage of the Human Rights Ordinance. He also showed the dual effects of racism and sexual orientation discrimination in his life.

In Mr. Guckenberger's opinion, if Article XII of the charter becomes effective, it is likely that elected city representatives and other city officials will be prevented from enacting, adopting, enforcing or administering any "ordinance, rule, regulation or policy" on behalf of gay, lesbian, and bisexual citizens, regardless of its merit. Mr. Guckenberger noted that after Issue 3, laws that benefit the gay and lesbian community will have to be adopted by Charter amendment--a burdensome task that requires a city wide

campaign and support of a majority of the voters; a far more onerous task than lobbying the City Council or City administration for protection of the gay community.

Moreover, the point of doing the campaign work and gaining access to council's political corridors of power is lost if counsel cannot deliver any response on the issues that affect this identifiable group. Thus, attempting to work with the City Council or administration would be rendered meaningless.

We find that by its own terms, Issue 3 singles out persons with "homosexual, lesbian or bisexual orientation." Furthermore, it does not target specific types of problems that affect all citizens for its restrictions, but rather it targets specific citizens based upon their sexual orientation. Mr. Guckenberger could recall no other time in the history of the City of Cincinnati when such a charter provision was enacted.

Finally, Cincinnati City ordinance No. 490-1992 (Human Rights Ordinance) prohibits discrimination based on many factors, including sexual orientation, in the areas of private employment, public accommodations and housing. Discrimination based upon sexual orientation, whether it be heterosexual, lesbian, gay or bisexual, is prohibited by this ordinance.

No evidence was offered by the Defendant City of Cincinnati or the intervenor to demonstrate that it is not substantially likely that the charter amendment will prohibit enforcement of the Human Rights Ordinance or EEO Ordinance insofar as they prohibit discrimination against gay men, lesbians and bisexuals. The charter amendment will not disturb enforcement of the provisions which prohibit discrimination against heterosexual people.

STANDARD

In determining whether to issue a preliminary injunction the district court must balance four interrelated criteria:

1) Whether the Plaintiffs have shown a strong or substantial likelihood or probability of success on the merits;
2) Whether the Plaintiffs have shown irreparable injury;
3) Whether the issuance of a preliminary injunction would cause substantial harm to others; [and]
4) Whether the public interest would be served by issuing a preliminary injunction.

N.A.A.C.P. v. City of Mansfield Ohio, 866 F.2d 162, 166 (6th Cir. 1989); *Weaver v. University of Cincinnati*, 942 F.2d 1039, 1043 (6th Cir. 1991).

ANALYSIS

a) Substantial Likelihood of success

The Plaintiffs in this case claim that Issue 3 infringes, among other things, their fundamental right to participate equally in the political process, in violation of the Equal Protection Clause of the United States Constitution. Under the Equal Protection Clause there are three standards which may be applicable in reviewing an equal protection challenge: strict scrutiny, intermediate scrutiny, and rational basis review. *See City of Cleburne v. Cleburne Living Center Inc.*, 473 U.S. 432, 440 (1985). Legislation that infringes a fundamental right must be examined under the strict scrutiny standard of review. *Id.; Kramer v. Union Free School Dist. No. 15*, 395 U.S. 621, 626 (1969). Consequently, we must first consider whether the right to participate equally in the political process is a fundamental right. As discussed below, we conclude that there is a strong likelihood that such right exists, and that the Defendant has violated it. Accordingly we review this equal protection challenge under the strict scrutiny standard of review.

1

We find support for our decision in the thorough analysis of the Colorado Supreme Court in *Evans v. Romer*, 854 P.2d 1270

(Colo.), *cert. denied*, 1993 LEXIS 6909 (1993). The *Evans* court noted that,

> [t]he right of citizens to participate in the process of government is a core democratic value which has been recognized from the very inception of our republic up to the present time.

Evans, 1276. Thus, it is not surprising that the United States Supreme Court has consistently rejected legislation establishing preconditions on the right to vote. *See Kramer v. Union Free School Dist. No. 15*, 395 U.S. 621 (1969) (invalidating law requiring children or ownership of property as precondition to vote); *Harper v. Virginia Board of Elections*, 383 U.S. 663 (1966) (holding poll tax unconstitutional); *Carrington v. Rash*, 380 U.S. 89 (1965) (holding unconstitutional law requiring civilian status to vote).

Although these cases dealt with laws directly restricting the exercise of the franchise, we find that these cases stand for the broader principal that all people have the right to be free from restrictions which would "pose the danger of denying some citizens any *effective* voice in the governmental affairs which would substantially affect their lives." *Kramer*, 395 U.S. at 627 (emphasis added). Thus, "*[a]ny* unjustified discrimination in determining who may participate in *political affairs* or in the selection of public officials undermines the legitimacy of representative government." *Id.* at 626 (emphasis added). As a consequence, any laws which "fence out" a group of voters because of a fear of their views or because of the way they vote, threatens the group's ability to "exercise . . . rights so vital to the maintenance of democratic institutions." *Carrington*, 380 U.S. at 94. We readily conclude that these pronouncements embody principals not simply confined to cases involving the right to vote.

A second line of cases are more directly on point as they deal not with a precondition or restriction on the right to vote, but rather with the value of one's vote, in other words, the right to have one's vote count as well as be counted. *See Reynolds v. Sims*, 377 U.S. 533, 566 (1964) ("[d]iluting the weight of votes because of place of residence impairs basic constitutional rights under the Fourteenth Amendment just as much as invidious discrimination based upon factors such as race"); *New York City Board of Estimate v. Morris*, 489 U.S. 688, 693 (1989) ("each and every citizen has an inalienable right to full and effective participation in the political process"); *Gray v. Sanders*, 372 U.S. 368, 380 (1963) ("the right to have one's vote counted has the same dignity as the right to put a ballot in the box").

That these case stand for the broader proposition that all citizens have not only the right "to vote" but also the deeply rooted right to meaningful and equal participation in the political process was made crystal clear in *Reynolds v. Sims*, 377 U.S. 533 (1964). In *Sims*, the Court observed that with

> the birth of our National Government, and the adoption and ratification of the Federal Constitution, state legislatures retained a most important place in our Nation's governmental structure. But representative government is in essence self-government through the medium of elected representatives of the people, and each and every citizen has an *inalienable right to full and effective participation in the political process* of his State's legislative bodies. *Most citizens can achieve this participation only as qualified voters through the election of legislators to represent them.* Full and effective participation by all citizens in state government requires therefore, that each citizen have an equally effective voice in the election of members of his state legislature. Modern and viable state government needs, and the Constitution demands, no less.

Sims, 377 U.S. at 564-65 (emphasis added); *New York City Board of Estimate*, 489 U.S. at 693.

Consequently, if a representative is powerless to act on behalf of an identifiable group, the members of that group are not "self-govern[ing] through the medium of elected representatives" *see Sims*, 377 U.S. at 564-65, and thus, the right to "put the ballot in the box" *see Gray*, 372 U.S. at 380 (1963), is but a meaningless procedure. Simply put, the right to vote for someone who is powerless to represent the voter renders meaningless the right to vote for that person. It has been written, the right to full and fair representation "imports more than the mere right to cast a vote that will be weighted as heavily as the other votes cast in the election." Lawrence H. Tribe, American Constitutional Law §13-7, at 1074. Therefore, although gay, lesbian and bisexual citizens have the right to *cast* a vote, Issue 3's restriction on council members' and other city administrators' ability to act on their behalf eliminates the very purpose and significance of that vote.

3

The third type of cases crucial to our decision are cases involving candidate eligibility. Again, in these cases, actual access to the ballot box was not at issue. Rather, in *Williams v. Rhodes*, for example, the Court held that certain state election laws violated the equal protection clause because they gave "two old, established parties a decided advantage over any new parties struggling for existence and thus place *substantially unequal burdens* on both the right to vote and the right to associate." 393 U.S. 23, 31 (1968). The Court continued that the "right to form a party for the advancement of political goals means little if a party can be kept off the election ballot and thus denied an equal opportunity to win votes." *Id.* Although the plaintiffs in *Williams* were never denied their right to *cast* a vote, the Court nonetheless referred to the right to "*vote effectively[]*" simply in terms of the "right to vote." *Williams*, 393 U.S. 23, 30, 31 (emphasis added). Consequently, the Court required the state to demonstrate a compelling state interest.

Thus, the Court held that,

> [i]n the present situation the state laws place burdens on... the right of individuals to associate for the advancement of political beliefs, and the right of qualified voters, regardless of their political persuasion, to cast their votes effectively.
>
> * * *
>
> The State has here failed to show any "compelling interest" which justifies imposing such heavy burdens on the right to vote and to associate.

Id. Again, of paramount importance was the right to vote *effectively*, not the mere right "to put a ballot in the box."[1]

4

Finally, and perhaps most significantly, are the cases involving legislation which alters the normal political process of enacting laws with respect to an identifiable group. In *Hunter v. Erickson*, 393 U.S. 385 (1969), the Supreme Court invalidated an Akron, Ohio city charter amendment, passed by a majority of the voters, that provided that the city council could implement no ordinance dealing with racial, religious, or ancestral discrimination in housing without the approval of a majority of the city's voters. In applying the strict scrutiny standard of review, the Court held the amendment violative of the Equal Protection Clause. *Id.* The Court stated in unambiguous terms that,

> [e]ven though Akron might have proceeded by majority vote at town meeting on all its municipal legislation, it has instead chosen a more complex system. Having done so, the State may no more disadvantage *any particular group* by making it more difficult to enact legislation in its behalf

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[1] In fact, the Court recognized that "the right of individuals to associate for the advancement of political beliefs, and...the right [of voters] to cast their votes effectively...of course, rank among our most precious freedoms." *Williams*, 393 U.S. at 30.

than it may dilute any person's vote or give any group a smaller representation than another of comparable size.

Id. at 392-93 (emphasis added).

Similarly, in *Gordon v. Lance*, 403 U.S. 1 (1971), the Court considered the constitutionality of a state's constitutional and statutory mandates requiring approval of 60% of the voters before increasing bonded indebtedness, or increasing the tax rate beyond a certain amount. The Court stated that,

> we can discern no *independently identifiable group or category* that favors bonded indebtedness over other forms of financing. Consequently, no sector of the population may be 'fenced out' from the franchise because of the way they will vote.
>
> * * *
>
> We conclude that so long as [the legislation does] not discriminate against or authorize discrimination against any identifiable class they do not violate the Equal Protection Clause.

Id. at 5, 7 (emphasis added) (citation and footnote omitted).

We acknowledge that *Hunter*, although significantly not *Gordon*, involved the issue of racial discrimination. We do not agree, however, that the holdings of these cases are limited to cases involving racial discrimination.[2] Rather, we conclude that

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[2] First, the cases speak unmistakably in race-neutral terms. *See, e.g., Hunter v. Erickson*, 393 U.S. 385 (1969) ("state may no more disadvantage *any particular group* . . ."); *Washington v. Seattle School District No. 1*, 458 U.S. 457, 470 (1982) ("laws structuring political institutions or allocating power according to "neutral principles . . . are not subject to equal protection attack"); *Gordon v. Lance*, 403 U.S. 1, (1971) ("so long as the [legislation does] not discriminate against or authorize discrimination against *any identifiable class* . . . ."). Furthermore, *Gordon*, a case not involving race, was distinguished

these cases stand for the broader proposition that states may not disadvantage *any* identifiable group, whether a suspect category or not, by making it more difficult to enact legislation on its behalf. *See Evans*, 854 P.2d at 1281, 1283; *Gordon*, 403 U.S. at 7; *Hunter*, 393 U.S. 385, 393; Note, *Constitutional Limits on Anti-Gay Rights Initiatives*, 106 Harv. L. Rev. 1905, 1916-17 (1993). Consequently, "so long as such provisions do not discriminate against or authorize discrimination against *any* identifiable class, they do not violate the Equal Protection Clause. *See Gordon*, 403 U.S. at 7 (emphasis added) (footnote omitted); *Hunter*, 393 U.S. 385, 393; *Evans*, 854 P.2d at 1281, 1283; *see also Taxpayers United v. Austin*, 994 F.2d 291, 297 (6th Cir. 1993) (upholding constitutionality of nondiscriminatory restriction on ability to use the "initiative procedure" in Michigan, but cautioning that "[o]ur result would be different if . . . [the

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from *Hunter* not because the legislation in *Gordon* did not specifically involve a racial minority, but rather because the legislation involved no identifiable group at all. Thus, as the Supreme Court of Colorado pointed out, if *Hunter*

> were decided solely on the basis of the "suspect" nature of the class[] involved, there would have been no need for the Court to consistently express the paramount importance of political participation or to subject legislation which infringed on the right to participate equally in the political process to strict judicial scrutiny. To the contrary, were [*Hunter*] . . . simply a "race case[]" the Supreme Court would have been required to do nothing more than to note that the legislation at issue drew a distinction that was inherently suspect (*i.e.*, that discriminated on the basis of race), and apply strict scrutiny to resolve [that] case[] -- irrespective of the right, entitlement, or opportunity that was being restricted. . . . *Kramer v. Union School Free District No. 15*, 395 U.S. 621, 628, n.9 . . . .

Evans v. Romer, 854 P.2d 1270, 1283 (Colo. 1993); *see Citizens for Responsible Behavior v. Sup. Court.*, 2 Cal. Rptr.2d 648, 656 (Cal. App. 1991).

plaintiffs] were being treated differently than other groups seeking to initiate legislation").[3]

In light of the forgoing, and based on the record, we conclude that there is a strong likelihood that under the Issue 3 Amendment, all citizens, with the express exception of gay, lesbian and bisexual citizens, have the right to appeal directly to the members of city council for legislation, while only members of the Plaintiffs' identifiable group must proceed via the exceptionally arduous and costly route of amending the city charter before they may obtain any legislation bearing on their sexual orientation. Thus, there is a substantial likelihood that the Issue 3 Amendment "fences out" an identifiable group of citizens--gay, lesbian and bisexuals--from the political process by imposing upon them an added and significant burden on their quest for favorable legislation, regulation and policy from the City Council and city administration.[4]

Furthermore, with respect to the Plaintiffs' First Amendment claims, in this case, not only will gay, lesbian and bisexual citizens be virtually unable to obtain legislation for their group no matter how great the need, but also their advocacy may expose them to discrimination for which they will have no recourse even remotely comparable to that of other groups, to obtain protection, thereby increasing the risks of, and consequently chilling, such expression.[5]

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[3] We note that despite the Defendants' urging, we decline to interpret the phrase "identifiable group" as used in the above cases to be synonymous with the phrase "suspect category." *See, e.g., Anderson v. Celebrezze*, 460 U.S. 780, 791, 792 (1983) (labeling supporters of independent political candidate "identifiable group").

[4] As Mr. Guckenberger testified, there is a "dramatic difference" between getting an ordinance passed and getting a charter amendment passed.

[5] In fact, one witness testified that with the passage of Issue 3, some members of organizations advocating gay, lesbians and bisexual

Therefore, we find a substantial likelihood that Issue 3 will "ha[ve] the inevitable effect of reducing the total quantum of speech on a public issue" *see Meyer v. Grant*, 486 U.S. 414, 423 (1988); as such, there is a substantial likelihood that the implementation of issue 3 will chill the First Amendment rights of citizens and organizations dedicated to the advocacy of issues effecting the gay, lesbian and bisexual community. *See Id.; see also Merrick v. Board of Higher Education*, 841 P.2d 646, 651 (Or. 1992) ("Not only does the statute discourage [gays, lesbians and bisexuals] from telling others their sexual orientation, it also discourages them from becoming involved in groups advocating gay and lesbian rights, a constitutionally protected activity, because such involvement might expose them to personnel action. The statute's practical effect is to chill speech and other expression and to severely limit open communication . . . .").

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Finally, we find especially significant the fact that under the Cincinnati Human Rights Ordinance heterosexuals are still a protected class of people, while Issue 3 would remove only gay, lesbian and bisexual citizens from those citizens protected from the ordinance's prohibition of discrimination based on sexual orientation. This only reinforces our conclusion that the Defendants have proffered no compelling justification to single out gay, lesbian and bisexual citizens for the additional and substantial burdens imposed on their ability to obtain legislation not required of any other identifiable group of citizens. The Court is unaware of what compelling state interest is furthered by removing City Council's and the City administration's ability to address the concerns of one single group of people no matter what need may arise in the future and under what circumstances,

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rights have ceased donating to the organizations.

while all others may benefit from the direct action of the City Council and City administrators.[6]

Consequently, the Court finds that there is a substantial likelihood that Issue 3 infringes the Plaintiffs' First Amendment rights, and their fundamental right to participate equally in the political process. Similarly, we find that there is a strong likelihood that there is not a compelling state interest in the enactment of Issue 3.

b) Irreparable Harm and Harm to Others

We also conclude that the Plaintiffs will suffer irreparable harm if the Court does not issue the injunction because of the threatened infringement of the Plaintiffs' fundamental rights. *See Evans v. Romer*, 854 P.2d 1270, 1286 (Colo.), *cert. denied*, 1993 LEXIS 6909 (1993); *Elrod v. Burns*, 427 U.S. 347, 373 (1976) (citing *New York Times Co. v. United States*, 403 U.S. 713 (1971)); *Weaver v. University of Cincinnati*, 942 F.2d 1039, 1043 (6th Cir. 1991). Similarly, we conclude that maintaining the status quo under the existing city Human Rights Ordinance and EEO Ordinance is the far more prudent course of action in light of the nature of the threat faced by the Plaintiffs in, among other things, their employment and housing situations. Thus, while no harm will occur to others if the preliminary injunction is issued, the increased threat of harassment which we view as likely to

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[6] We also note that even under a rational basis standard of review, based on the record, there is a significant likelihood that amendment 3 would not pass muster. *See Steffan v. Aspin*, No. 91-5409, 1993 U.S. App.LEXIS 29521, at *39-*42 (D.C. Cir. Nov. 16, 1993) (military's ban on homosexuals lacked rational basis); *Pruitt v. Cheney*, 963 F.2d 1160, 1166 (9th Cir. 1991), *cert. denied*, 113 S. Ct. 655 (1992) (same); *Citizens for Responsible Behavior v. Sup. Court.*, 2 Cal. Rptr.2d 648, 656 (Cal. App. 1991) (anti-gay initiative requiring a majority vote to enact any prohibition on sexual orientation discrimination lacked rational basis).

occur if Issue 3 is given effect, would seriously undermine the public interest.

CONCLUSION

Accordingly, the Court hereby GRANTS the Plaintiffs' Motion for Preliminary Injunction, prohibiting the implementation of issue 3, until further order of this Court, and ORDERS the Plaintiffs to post bond in the amount of one hundred dollars.

SO ORDERED.

Dated Nov. 19, 1993

S. Arthur Spiegel
United States District Judge

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

EQUALITY FOUNDATION OF GREATER CINCINNATI, INC., ET AL. (94-3855/3973/4280).

Plaintiffs-Appellees,

v.

CITY OF CINCINNATI (94-3973/4280),

Defendant-Appellant

EQUAL RIGHTS NOT SPECIAL RIGHTS, ET AL. (94-3855)

Intervening Defendants-Appellants.

Filed February 5, 1998

BEFORE: KENNEDY, KRUPANSKY, and NORRIS, Circuit Judges

The court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this court, and less than a majority of the judges having favored the suggestion, the petition for rehearing has been referred to the original panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly the petition is denied.

BOGGS, Circuit Judge, concurring in the denial of the suggestion for rehearing en banc.

Even the staunchest proponents of the Supreme Court's decision in *Romer v. Evans*, 116 S. Ct. 1620 (1996), readily admit that the Court in that case purposely crafted a narrow opinion focused on the precise factual situation presented by Colorado's Amendment 2. *See, e.g.*, Cass R. Sunstein, *Foreword: Leaving Things Undecided*, 110 Harv. L. Rev. 4, 6 (1996) (noting that *Romer* and other recent "minimalist" cases "leave"[] issues open for democratic deliberation, but also and more fundamentally . . . promote[] reason-giving and ensure[] that certain important decisions are made by democratically accountable actors.") I write separately to point out that, contrary to the view expressed by my dissenting colleagues, *Romer* said nothing about whether a city like Cincinnati could choose to foreclose the enactment of possible salutary, but also possibly insidious, gay-rights ordinances. *Romer*'s holding is simple: a state may not, by constitutional amendment, prohibit a municipal government from enacting ordinances conferring benefits or protections on gay residents. See *Romer*, 116 S. Ct. at 1626. As explained below, nothing about this holding calls into question the judgement of the panel in this case, and I therefore concur in the court's denial of the petition for rehearing en banc.

The federal Constitution contemplates only two sovereigns: the United States itself, on the one hand, and the respective states, on the other. Romer, along with evidence from the Constitutional text itself (for example, the Guaranty Clause, *see* U.S. Const. art. IV, § 4), at most arguably suggests that *state* government may not be structured so as to uniquely burden the ability of gays (or members of other non-suspect classes) to participate in the political life of the sovereign absent a demonstrable, rational reason for doing so. Even this limited principle, however, does not apply to *cities*, which are not constitutionally cognizable political sovereignties and which therefore, vary widely in their forms of government. Perhaps more so than states, "[c]ities . . . [are] laboratories for political experiments in public participation." Joseph P. Tomain, *On Local Autonomy: Discontinuity and Convergence*, 55 U. Cin.

L. Rev. 339, 418 (1988). Indeed, one of the rationales for Ohio's home-rule statute is that "home rule permits cities and counties to serve as laboratories for innovations in government, a role for which their limited size is ideally suited." Stephen Clanca, *Home Rule in Ohio Counties: Legal and Constitutional Perspectives*, 19 U. Dayton L. Rev. 533, 534 (1994).

In my opinion, Cincinnati's Issue 3 merely reflects the kind of social and political experimentation that is such a common characteristic of city government. Cincinnati (unlike other cities in Ohio) has made a political judgement, expressed by plebiscite, that its city council will not enact ordinances that confer legal status or benefits based on sexual orientation. It is not the case that this judgement deprives anyone of their right to participate in the political life of the sovereign (*i.e.*, the State of Ohio). Unlike gays in Colorado after the passage of Amendment 2, gay residents of Cincinnati are not even arguably deprived of their rights under the state civil rights laws, nor are they deprived of their right to seek redress in the state legislature. In this respect, gays in Cincinnati are in a situation essentially similar to Colorado gays who happen not to reside in Aspen, Boulder, or Denver (the three cities whose gay-rights ordinances would have been nullified by Amendment 2). In short, if in *Romer* the Supreme Court held that cities may choose to enact gay-right ordinances without nullification by state constitutional amendment, it did not hold that cities *must* choose to do so. It is not constitutionally offensive that over time some cities (*e.g.*, Aspen, Boulder, and Denver) will pass such ordinances, while others (*e.g.*, Cincinnati) will not.

Since Issue 3 does not implicate the same kind of political-process concerns identified by the Supreme Court in *Romer*, it remains only to consider whether there was a rational reason for Cincinnati voters to approve the change in the city charter. District Judge Spiegel concluded that there could be no such rational reason. Judge Spiegel's view of the human cortex notwithstanding, I find it difficult to label all of the following hypothetical Cincinnati residents utterly irrational.

Fred is a small business owner who is gay. He has many gay customers and employees. Being gay himself, Fred knows

that he would not discriminate against gays whether or not Issue 3 were to pass. However, as a small business owner, Fred believes that he is vulnerable to lawsuits, meritorious or not, and he understandably does not want his legal exposure to increase as a result of a proliferation of group-rights laws. Fred also recognizes that competitions who are situated, by market or geography, so as to have fewer gay employees, applicants, or customers may be in a more favorable market position with regard to this added expense. Fred recognizes that Bill, another gay business owner, believes that if Issue 3 is defeated, it will be anti-gay employers who will suffer more, and that the potential for litigation against them will actually advantage gay business owners. Fred has a different view, however, and decides to vote for Issue 3.

Sally, who is also gay, is politically of a libertarian persuasion. Although she believes that it is both wrong and stupid for employers and landlords to discriminate on the basis of sexual orientation, she believes that she has no moral right to interfere with their market choices. Sally believes that, after all, she did not build the employers' businesses or the landlords' houses, and she therefore has no right to use force to affect their personal choices. She decides to vote for Issue 3.

Irving is gay, but unlike Sally he has no moral qualms about using state power against anti-gay business owners. However, his readings in economics have led him to conclude that without Issue 3, prospective employers will believe that every gay employee now comes with a more expensive price tag: the expected cost of lawsuits by that employee, discounted by the likelihood of such suits. He believes that the extra cost to the employer will actually increase covert discrimination, especially in initial hiring, to such an extent that he will be hurt by that factor more than he could be helped by the anti-discrimination laws themselves. He believes that his skills and situation are such that he will not encounter serious discrimination once on the job, but that in the absence of Issue 3, he will actually suffer more from pre-employment discrimination.

John is an employer who concluded, after reading *Mein Kampf* and the *Diary of Anne Frank*, that Nazis are bad people,

and he therefore refuses to hire skinheads or other perceived Nazi sympathizers. For completely different reasons, based on his reading of the Bible and literature disseminated by the NAMBLA organization, John also believes that homosexuals are bad people, and so he refuses to hire them as well. He decides to vote for Issue 3.

James is an employee. He has no prejudice against gay people, but believes that, in the absence of Issue 3, an employer may find it easier to fire him rather than a gay co-worker, if push comes to shove, because firing the co-worker raises the prospect of a costly discrimination lawsuit, meritorious or not. James thus believes it is in his economic self-interest to vote for Issue 3.

In *Romer*, the Supreme Court said that "[a] State cannot . . . deem a class of persons a stranger to its laws," *Romer*, 116 S. Ct. at 1629. In the present case, no state has done so. Instead, a *city* has made a political judgement that it will not enact gay-rights measures of the sort adopted in Aspen, Boulder, or Denver. Because the *Romer* Court's special concern that no group be excluded from the political life of the sovereign does not apply here, this court was obligated to uphold Issue 3 as long as it was a rational means of achieving some permissible state interest. Unless each of the people described above justly can be deemed patently irrational -- and I cannot imagine how, in good faith, they could be -- Issue 3 satisfies this test.

GILMAN, Circuit Judge, with whom Chief Judge MARTIN, Judges DAUGHTREY, MOORE, COLE and CLAY join, dissent.

Because we believe that the panel's opinion (whose earlier decision in this case was vacated by the Supreme Court and remanded for further consideration in light of *Romer v. Evans*, 118 S. Ct. 1620 (1996)) conflicts with the Supreme Court's decision in that case, we dissent from the majority's decision to deny en banc review.

In *Romer*, the Supreme Court was presented with the question of whether Colorado's Amendment 2, which had been adopted in a statewide referendum, was constitutional under

the Equal Protection Clause. Amendment 2 prohibited the enactment of any measure designed to protect individuals due to their sexual orientation. *Id.* at 1623. Because of its passage, Amendment 2 rescinded a number of municipal ordinances, an executive order signed by the governor of Colorado, a provision of the state's insurance code, and various anti-discrimination policies adopted at state run universities. *Id.* at 1624-25. The State's principal argument for upholding Amendment 2 was that "the measure does no more than deny homosexual special rights." *Id.* at 1624. Although the Supreme Court questioned the State's construction of the amendment, the Court found Amendment 2 infirm even on the narrow reading offered by the State. Applying rational basis review, the Supreme Court struck down Amendment 2. In reaching this result, the Supreme Court held: "Amendment 2 fails, indeed defies, even this conventional inquiry [*i.e.*, rational basis review]. First, the amendment has the peculiar property of imposing a broad and undifferentiated disability on a single named group, an exceptional and, as well shall explain, invalid form of legislation. Second, its sheer breadth is so discontinuous with the reasons offered for it that the amendment seems inexplicable by anything but animus toward the class that it affects; it lacks a rational relationship to legitimate state interests." *Id.* at 1627.

In this case, the people of Cincinnati passed Issue Three in a local ballot measure, which amended Cincinnati's city charter. Issue Three, which was based on the language used in Amendment 2 and is substantially similar, prohibits the city of Cincinnati from enacting any measure designed to protect individuals due to their sexual orientation. In a pre-*Romer* decision, this court upheld Issue Three under rational basis review. Over the dissent of three justices, the Supreme Court granted certiorari and remanded the case for reconsideration in light of *Romer*.

On remand, the panel sought to distinguish *Romer* on a number of grounds, each of which ultimately had its genesis in the rationale proffered by the *dissenting* justices in the order remanding this case for further consideration. *Equality Foundation of Greater Cincinnati, Inc. v. City of Cincinnati*,

116 S. Ct. 2519 (1996). As a majority of the Supreme Court obviously did not share the views of the dissent, using the dissent's rationale is itself suspect. Moreover, the distinctions drawn by the dissent and later articulated by the panel appear to be either refuted by the facts or the principle of law announced in *Romer*.

The panel first began by noting that "the salient operative factors which motivated the *Romer* analysis and result were *unique* to that case and were not implicated in" this case. *Equality Foundation of Greater Cincinnati, Inc. v. City of Cincinnati*, 128 F.3d 289, 295 (6th Cir. 1997) (emphasis added). The panel acknowledged that the *Romer* Court struck down Amendment 2 on the narrowest reading advocated for the measure, *i.e.*, the withdrawal of special rights for homosexuals. *Id.* at 295. The panel nevertheless opined that Amendment 2's true constitutional infirmity rested with the "ominous" possibility that it could be read broadly to withdraw from homosexuals the protection afforded to all of Colorado's citizens. *Id.* at 296-97. Since the panel construed Issue Three to only divest homosexuals of special rights, it is allegedly distinguishable from Amendment 2. *Id.* at 296. The panel's analysis appears faulty, however, because the Supreme Court expressly declined to decide the case based on such a possibility. ("If this consequence [the withholding of protection provided by statutes of general application] follows from Amendment 2, as its broad language suggests, it would compound the constitutional difficulties the law creates. The state court did not decide whether the amendment has this effect, however, *and neither need we*." *Romer*, 116 S. Ct. at 1626 (emphasis added)).

The panel then noted that the Supreme Court struck down Amendment 2 because the only avenue through which homosexuals could seek redress after Amendment 2 was by "the formidable political obstacle of securing a rescinding amendment to the state constitution." *Id.* at 297. Because homosexuals could "seek local repeal [of Issue Three] through ordinary municipal political processes," the panel declared Issue Three did not impose as onerous a burden as Amendment 2. *Id.* at 297. This distinction is unpersuasive, however, given

that the Supreme Court expressly declined to rest its holding on the political restructuring cases, such as *Hunter v. Erickson*, where such distinctions are normally used. *Romer*, 116 S. Ct. at 1624. Therefore, the fact that it is easier for a group to seek the repeal of a city charter amendment as opposed to a state constitutional amendment is of no consequence as far as the essential rationale of *Romer* is concerned.

The panel also stated that the Supreme Court employed an "extra-conventional" application of equal protection principles in *Romer* because Amendment 2 was passed by people living outside the municipalities that had passed anti-discrimination ordinances. *Id.* at 297. It opined that since the voters in Colorado were not directly affected by the ordinances they sought to repeal through Amendment 2, no rational relationship to a legitimate state interest existed. The panel's hypothesis, while novel, ignores the facts in *Romer*. Amendment 2 not only invalidated city ordinances; it also rescinded a section of the state's insurance code, an executive order signed by the state's governor, and various anti-discrimination policies adopted by state run universities. Therefore, the citizens of Colorado were indeed directly affected by the measures they sought to repeal when they passed Amendment 2.

Finally, the panel makes the sweeping statement that "[i]n any event, *Romer*, should not be construed to forbid local electorates the authority, via initiative, to instruct their elected . . . representatives . . . to withhold special rights." *Equality Foundation*, 128 F.3d at 298. *Romer*, however, was decided on equal protection grounds, which applies to local as well as state governmental action. Therefore, the fact that Issue Three is a local as opposed to a state measure is of no controlling significance for purposes of the Equal Protection Clause. *See City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432 (1985).

Whether or not we agree with the majority decision in *Romer*, we are of course obligated by law to give rulings of the Supreme Court full force and effect. We believe the panel decision in this case draws "distinctions without a difference" and fails to abide by the key ruling in *Romer* that "A law declaring that in general it shall be more difficult for one group of citizens than for all others to seek aid from the government

is itself a denial of equal protection of the laws in the most literal sense." 116 S. Ct. at 1628.

ENTERED BY ORDER OF THE COURT
Leonard Green/S
Leonard Green, Clerk

No. 97-1795

In The

Supreme Court of the United States

October Term, 1997

EQUALITY FOUNDATION OF GREATER CINCINNATI, INC.; RICHARD BUCHANAN; CHAD BUSH; EDWIN GREENE; RITA MATHIS; ROGER ASTERINO; AND H.O.M.E., INC.,

Petitioners,

v.

CITY OF CINCINNATI; EQUAL RIGHTS, NOT SPECIAL RIGHTS; MARK MILLER; THOMAS E. BRINKMAN, JR.; AND ALBERT MOORE,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

BRIEF OF RESPONDENT CITY OF CINCINNATI

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QUESTION PRESENTED FOR REVIEW

Whether a municipal charter amendment that prohibits a municipal government from creating "minority or protected status, quota preference or other preferential treatment" for "homosexuals, lesbians or bisexuals" violates the Equal Protection Clause?

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STATEMENT OF THE CASE

In 1991 and 1992 the City of Cincinnati passed two Ordinances that were aimed at providing certain groups of people with specific redress for alleged acts of discrimination. The foremost examples of these Ordinances were Ordinance number 79-1991 (hereinafter "EEO Ordinance") and Ordinance number 490-1992 (hereinafter "Human Rights Ordinance"). The EEO Ordinance made it illegal to discriminate on the basis of "sexual orientation" in hiring City employees and in making appointments to City Boards and Commissions. The Human Rights Ordinance made it illegal to discriminate on the basis of sexual orientation in the areas of private employment, public accommodation, and housing.[1]

In response to these measures, a group of private individuals formed an organization called "Take Back Cincinnati" which later changed its name to "Equal Rights Not Special Rights." One of the main priorities of this group was to collect sufficient signatures to place a Charter Amendment, which later became commonly known as Issue 3, on the ballot of the next general election.[2] The group was successful in obtaining the requisite

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[1] City Council has since repealed the portion of the Human Rights Ordinance forbidding discrimination on the basis of sexual orientation. Therefore, as petitioners correctly concede, the impact of Issue 3 on that measure is moot.

[2] The City of Cincinnati is a Charter Municipality organized and operating pursuant to the Home Rule provisions of Ohio's State Constitution. In a Charter municipality, the Charter acts as a sort of local constitution. Charter provisions supersede local ordinances, and the Charter may not be amended by the local legislature, which is known as City

number of signatures, and Issue 3 was placed on the November 2, 1993 ballot. Issue 3 provides as follows:

> "The City of Cincinnati and its various Boards and commissions may not enact, adopt, enforce or administer any ordinance, regulation, or policy which provides that a homosexual, lesbian or bisexual orientation, status, conduct, or relationship constitutes, entitles, or otherwise provides a person with the basis to have any claim of protected status, quota preference or other preferential treatment.
>
> This provision of the City Charter shall in all respects be self-executing. Any ordinance, regulation, rule or policy enacted before this amendment is adopted that violates the foregoing prohibition shall be null and void and of no force and effect."

In reaction to the formation of Equal Rights Not Special Rights, petitioner "Equality Cincinnati" was formed. One of the primary goals of Equality Cincinnati was to defeat the passage of Issue 3. Both Equality Cincinnati and Equal Rights Not Special Rights campaigned in favor of their respective positions on Issue 3. After a hard fought battle, Issue 3 was passed into law. The vote tally was approximately 62% for passage and 38% against.

Council. Rather, in order to amend the Charter, a majority of the voters in Cincinnati must vote in favor of a proposed revision or amendment at a general or special election. A measure may be placed on the ballot by City Council itself at its own initiative, but Council must place any measure on the ballot that has received the endorsement of a prescribed percentage of electors. Ohio Constitution, Article XVIII, Sections 3, 7, 8 and 9.

Prior to Issue 3 taking effect however, petitioners filed the present claim against the City of Cincinnati to enjoin the enforcement of Issue 3. As noted, petitioners claimed that Issue 3 violated their rights to equal protection, free speech, free association, and redress of grievances guaranteed by the First and Fourteenth Amendments to the United States Constitution. Petitioners also claimed that Issue 3 was unconstitutionally vague.

On November 15, 1993, Mark Miller, Thomas Brinkman, Jr., Albert Moore, and Equal Rights not Special Rights moved to intervene as defendants. On November 16, 1993, the trial court granted petitioners' motion for a preliminary injunction. On December 27, 1993, the district court granted the motion to intervene. On June 3, 1994, the trial court denied motions for summary judgment filed on behalf of the City and the intervening defendants.

A trial to the court was held and the trial judge heard testimony from a variety of expert and lay witnesses. After the trial, the district judge issued extensive findings of fact. The court concluded that the proposed Charter Amendment infringed petitioners' "fundamental right to equal access to the political process" as well as their rights of free speech and association and right to petition their government for redress of grievances, which violations subjected Issue 3 to strict scrutiny. Additionally, the court held that homosexuals as a group comprised a "quasi-suspect class." Further, the court found that Issue 3 was insufficiently related to any legitimate governmental interest to pass muster under a rational basis

analysis. Finally, the court held that Issue 3 was also void for vagueness.

The United States Court of Appeals for the Sixth Circuit reversed the district court's ruling in its entirety. First, the court of appeals noted that since the trial court's ostensible "findings of fact" were, in reality, findings of ultimate facts and interrelated applications of law, sociological judgments, mixed questions of law and fact, and/or findings designed to support "constitutional facts", these findings were subject to plenary appellate review.

Next, the court of appeals noted that homosexual orientation cannot be the basis for suspect classification in the context of Equal Protection analysis. Since homosexuals are not identifiable "on sight", those homosexuals that are affected by legislation concerning sexual orientation chose to be so affected by their conduct. Since *Bowers v. Hardwick*, 478 U.S. 186 (1986), held that homosexuals possess no fundamental right to engage in homosexual conduct, such conduct could not form the basis for suspect classification.

The court of appeals further held that there exists no fundamental right to equal participation in the political process. The cases upon which the district court relied for this fundamental right were, without exception, race-based classification cases. Since the realization of a homosexual legislative agenda is not constitutionally guaranteed, the narrow restriction upon the political avenues available to the unidentifiable and non-protected class of homosexuals and their allies does not rise to constitutional dimensions. The court of appeals recognized that

the opponents of Issue 3 "simply lost one battle of an ongoing political dispute."

Also, the court of appeals noted that Issue 3 did not impermissibly burden petitioners' rights of free speech or association, nor violate petitioners' right to petition their government for a redress of grievances. Since no fundamental right was involved the court of appeals found that the proper standard of judicial scrutiny was the "rational basis" standard. Under this highly deferential standard, social or economic legislation must be affirmed if there is any reasonably conceivable state of facts that could provide a rational basis for a classification. In other words, the party challenging the rationality of the legislation bears the burden of negating every conceivable basis for the action, regardless of whether or not such supporting rationale was cited by, or actually relied upon by the promulgating authority. The court of appeals noted that the measure furthered numerous legitimate public purposes, and therefore, passed constitutional muster when subjected to appropriate scrutiny.

Finally, the court of appeals held that Issue 3 was not unconstitutionally vague. This was especially true since City Council amended the Human Rights Ordinance to delete any reference to sexual orientation. Petitioners have not challenged the Sixth Circuit's ruling in this regard.

Petitioners timely filed their request to have this Court consider accepting an appeal. Subsequent to this Court's decision in *Romer v. Evans*, 517 U.S. 620, 116 S.Ct. 1620 (1996), invalidating the Colorado state constitutional

amendment, the writ was granted and the case was summarily remanded to the court of appeals "for further consideration in light of *Romer v. Evans* . . . "

Upon remand, the court of appeals ordered rebriefing by the parties and full rehearing (the latter conducted by that court on March 19, 1997) and, in a decision announced October 23, 1997, the court of appeals determined that Issue 3 and Colorado's Amendment 2 differ so critically that, while Amendment 2 offended the equal protection clause Issue 3 does not. "An exacting comparative analysis of *Romer* with the facts and circumstances of this case disclose that these contrary results were reached because the two cases involved substantially different enactments of entirely different scope and impact, which conceptually and analytically distinguished the constitutional posture of the two measures . . . the salient operative factors which motivated the *Romer* analysis and result were unique to that case and were not implicated in *Equality Foundation I.*" *Equality Foundation v. City of Cincinnati*, 128 F.3d 289, 295 (6th Cir., 1997) (hereinafter, *"Equality Foundation II"*).

In sum the court of appeals held that, " . . . the language of the Cincinnati Charter Amendment, read in its full context, merely prevented homosexuals, as homosexuals, from obtaining special privileges and preferences (such as affirmative action preferences or the legally sanctioned power to enforce employers, landlords, and merchants to transact business with them) from the City." *Equality Foundation II*, at 296. In "stark contrast" to the broad and sweeping language of Colorado's Amendment 2, the court of appeals found the language in Issue 3 to be "narrow" and "restrictive." *Id.*, at 297. Thus, the court of

appeals upheld the constitutionality of the charter amendment and directed that the district court enter judgment for the defendants. From that decision the petitioners timely took exception. They ask this Court to reject the reasoning of the United States Court of Appeals for the Sixth Circuit and adopt as law their own arguments. Respondent the City of Cincinnati opposes such suggestion and asks that the Court refuse the writ.

SUMMARY OF ARGUMENT

Petitioners' brief in support of the writ contains so many misstatements that specific enumeration is elusive. Nonetheless, perhaps the most incorrect statement is petitioners' bald assertion that "Cincinnati's Issue 3 charter amendment is identical in all material aspects to Colorado's 'Amendment 2.' " Although the motives for such a mischaracterization are obvious, is it nonetheless absolutely wrong. The fabrication is itself so material to petitioners' arguments that, once exposed there is little else respondents may succinctly add for this Court's consideration of the writ. It is precisely because Issue 3 and Amendment 2 are so distinct that the court of appeals has twice embraced the constitutionality of the notion that electors may democratically restrict their municipality's ability to award preferential treatment to a non-suspect class.

By its very language, Issue 3 deprives no citizen of the [equal] protection of the laws. Since it merely prohibits the granting of "special" or "preferential" treatment or privileges to gays, lesbians and bisexuals, Issue 3

represents an affirmation by Cincinnati citizens of the constitutional principle that these citizens, too, receive treatment from the municipal government that is equal to that afforded other, non-suspect-class-member citizens.

The Sixth Circuit's decision supports the right of the people, guaranteed by the constitutions of both the state of Ohio and the United States of America, to exercise the initiative process. The Sixth Circuit's decision ensures that irrespective of the consideration of their sexual orientation, all Ohio and Cincinnati citizens enjoy the right to petition their government for redress of grievances. The Sixth Circuit's decision supports equality. Respondent City of Cincinnati respectfully submits that the decision of the court of appeals gives due consideration not only to the plaintiffs but also to the First Amendment rights of all those citizens who voted to remove the ability of their elected and appointed municipal representatives to give additional, special, preferential treatment to a special interest group.

REASONS FOR DENYING THE WRIT

1. THE RULING BELOW IN NO WAY CONFLICTS WITH *ROMER V. EVANS*.

Petitioners argue that the court of appeals decision will prevent the City from enacting any anti-discrimination laws that will benefit that portion of the municipal citizenry that is "homosexual, lesbian or bisexual." To the extent that petitioners refer to the potential for enactment of privileges or preferences that are specific and unique to that group and would thus act to the disadvantage of

other citizens they are correct. However, to the extent that petitioners seek only such protections as are afforded all other citizens, their claim that all anti-discrimination benefits would be proscribed by the court's decision is flatly incorrect.

The key distinction between Cincinnati's Issue 3 and Colorado's Amendment 2, as noted by the court of appeals (and by Justice Scalia writing in dissent on the petition for a writ of certiorari in *Equality Foundation I*) is that Issue 3 prohibits only the enactment of special or preferential protection or treatment for this group while this Court found that Colorado's Amendment 2 might well prohibit any group member from making any claim of discrimination whatsoever.[3] This distinction is obvious when the two amendments are placed side-by-side. Colorado's Amendment 2 provided in pertinent part that:

> "Neither the State of Colorado through any of its branches or departments, nor any of its agencies, political subdivisions, municipalities or school districts, shall enact, adopt or enforce any statute, regulation, ordinance or policy whereby homosexual, lesbian or bisexual orientation, conduct, practices or relationships shall constitute or otherwise be the basis of or entitle any person or class of persons to have or claim any minority status, quota preferences, protected status *or claim of discrimination*."

[3] "It is a fair, if not necessary, inference from the broad language of the amendment that it deprives gays and lesbians even of the protection of general laws and policies that prohibit arbitrary discrimination in governmental and private settings." *Romer v. Evans*, at 517 U.S. at ___, 116 S.Ct. at 1626.

Romer v. Evans, 517 U.S. at ___, 116 S.Ct. at 1623 (emphasis added). In stark contrast to the reference in Amendment 2 that would prohibit any *"claim of discrimination,"* the language in Cincinnati's Issue 3 concludes by stating its blanket prohibition against "other *preferential* treatment." Petitioners refuse to identify this distinction as "material" simply because doing so would thwart their efforts to stand the Fourteenth Amendment on its head.

As the court of appeals noted, Issue 3's prohibition against preferences in no way prevents enforcement of any general, categorical municipal sexual orientation anti-discrimination law, unlike Colorado's Amendment 2, which banned even claims of discrimination. Prohibitions against discrimination on the bases of race, gender, etc. have never been found to accord any members of a subset of those groups (the "protected classes") "special" or "privileged" treatment. The conduct which is proscribed is the discrimination on the basis of the characteristic identified in the statute. The statute is not to be construed as "specially" or "preferentially" preventing discrimination against any identifiable subset within the statutory classification. For example, statutes prohibiting discrimination on the basis of race do not provide a specifically identifiable protection for African-Americans.

The only line of cases in which certain classes have been found to have received "special" rights are the affirmative action cases such as *City of Richmond v. Croson*, 488 U.S. 469, 109 S.Ct. 706 (1989) and *Bd. of Regents v. Bakke*, 438 U.S. 265, 98 S.Ct. 2733 (1978). In that line of cases, this Court consistently held that the creation of special rights, such as quotas and set-aside programs, violates the Equal Protection clause unless supported by

specific legislative findings indicating past patterns of discrimination and detailed findings that the remedy fashioned by the legislative body was narrowly tailored to combat such discrimination. See *Croson*, 109 S.Ct. at 724. This standard, as applied to racial classifications in *Croson* and *Bakke*, has been applied as well to gender-based classifications. See *F. Buddie Contracting Co. v. City of Elyria*, 773 F.Supp. 1018 (N.D. Ohio 1991). Thus, the Equal Protection clause itself has been found to prohibit the granting of "special" or "privileged" treatment except in very narrowly defined circumstances.

As such, any provision such as Issue 3, that purports to preclude special protection for any specified subset of a protected class would accomplish no more than the Equal Protection clause has been held to require in the above-cited line of cases. As no special treatment for an identifiable subset of a given classification can be conferred by a general anti-discrimination provision, a voter initiative that forecloses such special treatment is at most duplicative of the dictates of the Equal Protection clause and therefore in effect a nullity. Simply put, the voter initiative cannot "repeal" a protection that cannot have been properly accorded by the prior enactment. Just so, the holding of the court of appeals in *Equality Foundation II* does not conflict with this Court's ruling in *Romer*.

Nor does the court of appeals decision represent any infringement upon the ability of any Cincinnati electors to petition their government for redress of grievances. Constitutional rights to initiative and referendum are held by Ohio citizens under the state's constitution. These rights may not be abridged. Issue 3 does nothing to limit these rights, and the decision by the Sixth Circuit actually

reinforces the sanctity of that process.[4] Section 1f, Article II of the Ohio Constitution provides as follows:

> "The initiative and referendum powers are hereby reserved to the people of each municipality on all questions which such municipalities may now or hereafter be authorized by law to control by legislative action; such powers shall be exercised in the manner now or hereafter provided by law."

The rejection of a sufficient petition by a legislative authority constitutes an abuse of discretion. *State, ex rel. Citizens v. Widman*, 66 Ohio App.3d 286 (1990); *Heidtman v. Shaker Heights*, 99 Ohio App. 415, 119 N.E.2d 644 (1954), affirmed, 163 Ohio St. 109, 126 N.E.2d 138 (1955). Sections 8 and 9, Article XVIII of the Ohio Constitution provide that upon the submission of the proper initiative petition, City Council must place the question on the ballot at the

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[4] "In any event, *Romer* should not be construed to forbid local electorates the authority, via initiative, to instruct their elected city council representatives, or their elected or appointed municipal officers, to withhold special rights, privileges, and protections from homosexuals, or to prospectively remove the authority of such public representatives and officers to accord special rights, privileges, and protections to any non-suspect and non-quasi-suspect group. Such a reading would disenfranchise the voters of their most fundamental right which is the very foundation of the democratic form of government, even through the lowest (and most populist) organs and avenues of state government, to vote to override or preempt any policy or practice implemented or contemplated by their subordinate civil servants to bestow special rights, protections, and/or privileges upon a group of people who do not comprise a suspect or quasi-suspect class and are hence not constitutionally entitled to any special favorable legal status." *Equality Foundation II*, 128 F.3d at 298.

next general municipal election or at a special election called by Council. *State, ex rel. Blackwell v. Bachrach*, 166 Ohio St. 301 (1957). Council's review is limited to such matters as timeliness, regularity of signatures and form. Council is without authority to reject an initiative petition based upon claims of illegality or unconstitutionality of substantive provisions. *State, ex rel. Kittel v. Bigelow*, 138 Ohio St. 407 (1941). The charter amendment by initiative process must be liberally construed in favor of the exercise of this right by the electorate. *State, ex rel. Sharpe v. Hitt*, 115 Ohio St. 529 (1951); *State, ex rel. King v. Portsmouth*, 27 Ohio St.3d 1 (1986). In fact, if an initiative proposal is delayed at the Council level due to the failure of the Council to pass in timely fashion an ordinance directing that the measure be placed on the ballot, a mandamus action will lie against Council for abuse of discretion. *State, ex rel. Jurcisin v. Cotner*, 10 Ohio St.3d 171 (1984).

2. THE DEMOCRATIC DECISION BY MUNICIPAL ELECTORS TO WITHHOLD FROM THEIR MUNICIPAL GOVERNMENT THE POWER TO MANDATE PREFERENTIAL TREATMENT TO A NON-SUSPECT CLASS IS NOT A VIOLATION OF THE EQUAL PROTECTION CLAUSE.

In addition to the rational basis advanced above, *infra*, by this respondent that Issue 3 simply reaffirms the requirements of the Fourteenth Amendment, the decision of the court of appeals describes the "clear, actual, and direct individual and collective interests in that measure, and in the potential cost savings and other contingent benefits which could result from that local law." *Equality*

Foundation II, 128 F.3d, at 300, as contrasted with the facts in *Romer* where, "Clearly, the financial interests and associational liberties of the citizens of the state as a whole are not implicated if a municipality creates special legal protections for homosexuals applicable only within that jurisdiction and implements those protections solely via local governmental apparatuses." *Equality Foundation II*, 128 F.3d 300. The court of appeals decision notes the legitimacy of the significance attached by municipal electors to the financial implications of municipal-government-mandated preferential treatment for a non-suspect class, as contrasted with the facts in *Romer*. "Clearly, the Cincinnati Charter Amendment implicated at least one issue of direct, actual, and practical importance to those who voted it into law, namely whether those voters would be legally compelled by municipal ordinances to expend their own public and private resources to guarantee and enforce nondiscrimination against gays in local commercial transactions and social intercourse." *Id*. The court of appeals was very aware of the fact that this Court, in *Romer*, held that, with respect to Colorado's asserted state interest in conserving resources, "The breadth of the Amendment is so far removed from these particular justifications that we find it impossible to credit them." *Romer v. Evans*, 517 U.S., at ___, 116 S.Ct., at 1629. Although petitioners' brief implies that such interest was completely rejected by this Court in *Romer*, it is far more accurate to suggest that such interest was rejected only when advanced in support of a statewide law that conceivably banned any claim of discrimination. The repeated references throughout the decision by the

court of appeals to the limited scope of Cincinnati's Issue 3 are thus highly relevant.

CONCLUSION

For all of the above reasons, the petition for a writ of *certiorari* should be denied in this matter. The decision of the United States Court of Appeals for the Sixth Circuit should stand because it advances the most fundamental principle of our republic, to-wit: we Americans have the inalienable right to determine how we are governed. Further, the decision of the court of appeals reaffirms that right in consonance with the United States Constitution.

The decision of the court of appeals does not prevent lesbian, gay and bisexual Cincinnatians, but no others, from obtaining legal protection, as petitioners claim. In this case, it is abundantly clear that Cincinnatians do not wish to empower their municipal legislators or any other appointed municipal governmental representatives to enact laws or policies which would create quotas or other

preferential treatment, minority or protected status for this special interest group.

Respectfully submitted,

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No. 97-1795

In The

Supreme Court of the United States

October Term, 1997

EQUALITY FOUNDATION OF GREATER CINCINNATI, INC., RICHARD BUCHANAN, CHAD BUSH, EDWIN GREENE, RITA MATHIS, ROGER ASTERINO, and H.O.M.E., INC.,

Petitioners,

v.

THE CITY OF CINCINNATI, EQUAL RIGHTS NOT SPECIAL RIGHTS, MARK MILLER, THOMAS E. BRINKMAN, JR., and ALBERT MOORE,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether a decision by a local electorate to do away with local laws granting homosexuals "minority or protected status, quota preferences or preferential treatment" facially violates the Fourteenth Amendment because either (1) all decisions to deny homosexuals such status are inherently irrational or (2) the local electorates may never require their subordinate representatives to implement constitutionally-permissible substantive decisions.

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BRIEF IN OPPOSITION

Respondents Equal Rights, Not Special Rights, Mark Miller, Thomas E. Brinkman, Jr., and Albert Moore respectfully submit this brief in response to the petition for a writ of certiorari to the United States Court of Appeals for the Sixth Circuit filed on May 4, 1998, by petitioners Equality Foundation of Greater Cincinnati, Inc.; Richard Buchanan; Chad Bush; Edwin Greene; Rita Mathis; Roger Asterino; and H.O.M.E., Inc.

COUNTERSTATEMENT OF THE CASE

Petitioners' Statement of the Case omits and misstates information concerning the factual and legal background and context of this case.

I. The History and Factual Background of Issue 3

This case is about a disagreement between the people of Cincinnati and their elected representatives on the City Council over the question of whether or not homosexuals ought to be protected under Cincinnati's civil rights laws. On March 13, 1991, the City Council enacted Ordinance No. 79-1991, commonly known as the Equal Employment Opportunity Ordinance ("EEO Ordinance"), which prohibits the City of Cincinnati, in its capacity as a public employer, from discriminating in employment matters on the basis of, among other criteria, sexual orientation. Jt. App. 668.[1] On November 25, 1992, the City Council

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[1] References to the petition for a writ of certiorari filed by petitioners will be noted as "Pet." References to the Joint Appendix before the court of appeals will be described as "Jt. App." Joint Exhibits not included in the Joint Appendix will be referred to as "Jt. Exh." The full record in the district court will be referred to as "R."

passed Ordinance No. 490-1992, the so-called Human Rights Ordinance ("HRO"), which prohibits discrimination in employment, housing, and public accommodations based on, *inter alia*, sexual orientation.[2] Among other things, the HRO requires that those seeking roommates in one-bedroom apartments and devoutly religious employers and landlords accept homosexuals on an equal basis. Jt. App. 416-17; 673-79.

Following the enactment of the HRO, a group of Cincinnati citizens formed an organization called "Take Back Cincinnati" for the purpose of circulating petitions and gathering signatures sufficient to place on the ballot a proposed amendment to the Cincinnati city charter. The purpose of the charter amendment is to repeal the EEO Ordinance and the HRO insofar as both ordinances grant protected status to persons on the basis of sexual orientation, and to prevent the City Council and any City officials from according such status or other preferential treatment on the basis of sexual orientation. On November 2, 1993, the citizens of Cincinnati voted to amend the city charter by adopting Issue 3. The measure, which the electorate approved by a vote of 56,416 to 34,472, or approximately 62% to 38%, reads as follows:

> NO SPECIAL CLASS STATUS MAY BE GRANTED BASED UPON SEXUAL ORIENTATION, CONDUCT OR RELATIONSHIPS. The City of Cincinnati and its various Boards and Commissions may not enact, adopt, enforce or administer any ordinance, regulation, rule or policy which provides that homosexual, lesbian, or bisexual orientation, status, conduct, or relationship constitutes, entitles, or otherwise provides a person with the basis to have any claim of minority or protected status, quota preference or other preferential treatment.
>
> This provision of the City Charter shall in all respects be self-executing. Any ordinance, regulation, rule or policy enacted before this amendment is adopted that violates the foregoing prohibition shall be null and void and of no force or effect.

[2] The HRO makes it unlawful to discriminate against individuals on the basis of "race, gender, age, color, religion, disability status, sexual orientation, marital status, or ethnic, national or Appalachian regional origin." Jt. App. 670.

Besides the HRO and EEO Ordinance, there is no evidence of any Cincinnati program or policy that would be affected by Issue 3.

II. The Proceedings in the District Court

On November 8, 1993, five individual named homosexuals and two organizations – Equality Foundation of Greater Cincinnati, Inc. and H.O.M.E., Inc. ("petitioners") – filed a complaint seeking to block the amendment from taking effect on the grounds that Issue 3 allegedly violates their rights under the Equal Protection Clause and the First Amendment to the United States Constitution. The district court permitted an organization called Equal Rights, Not Special Rights ("ERNSR") and three named individuals ("respondents") to intervene in the case as defendants. ERNSR is the successor organization to "Take Back Cincinnati," and led the campaign to have Issue 3 adopted as a charter amendment.

On August 9, 1994, after five days of testimony, the district court permanently enjoined the charter amendment and held that Issue 3 infringes petitioners' right to participate equally in the political process; that gays, lesbians and bisexuals belong to a quasi-suspect category triggering the application of heightened scrutiny analysis

under the Equal Protection Clause; and that Issue 3 gives effect to private prejudice and is insufficiently linked to any legitimate governmental interest. With respect to petitioners' First Amendment claims, the district court held that Issue 3 violates petitioners' First Amendment right to free speech and association and their right to petition the government for redress of grievances. The district court also held that Issue 3 is unconstitutionally vague.

The district court also opined that Issue 3 encourages private prejudice and is designed to harm homosexuals, who the court believed were politically unpopular. Pet. at 61a-62a, 62a n.7, 64a and 96a. The district court made clear that its conclusions regarding the intent and effect of Issue 3 were based solely on its text. Pet. at 96a-97a. Due to binding circuit precedent, *Arthur v. Toledo*, 782 F.2d 565, 574 (6th Cir. 1986), the district court expressly eschewed any attempt to discern the voters' "intent" – prejudicial or otherwise. Pet. at 62a n.7. Although the scope and manner of the Issue 3 campaign concededly were irrelevant to the legal issues presented, the district court nonetheless found that ERNSR campaign materials were "grossly inaccurate" and "riddled with unreliable data, irrational misconceptions and insupportable misrepresentations about homosexuals." Pet. at 62a and 96a.[3]

[3] The only examples the district court could find to support these accusations related to its own rhetorical disagreement with the Issue 3 campaign on such matters as whether a group's inclusion in the protection of civil rights laws constitutes "special rights," whether homosexuals differ from other groups who are protected because their class is defined by sexual behavior, and whether the Supreme Court's suspect class analysis provides an appropriate guide for determining which groups are deserving of protection under civil rights laws. Pet. at 62a-63a. This is simply disagreement about legal and political rhetoric, and has nothing at all to do with "misrepresentations about homosexuals" or their lifestyle. Pet. at 62a. The reason the district court was unable to cite misrepresentations about the lifestyles or practices of homosexuals is because every public pronouncement of the ERNSR campaign dealt directly with the legal and political question of whether homosexuals should receive special civil rights protections.

The undisputed evidence established that the issue of AIDS was mentioned by anyone, even indirectly, exactly four times in the campaign. The only other discussion of any aspect of homosexual lifestyle or sexuality was confined to a few pamphlets and books which, the undisputed testimony established, were distributed to no more than 20 people, were never referred to by anyone associated with ERNSR, and thus could not possibly have had any effect on voters' attitudes on Issue 3. *See* Jt. App. 418-19; 429-30; 471-73. *See also* Jt. Exh. V, at 114-16, 156-67. In all events, the undisputed evidence showed that there was no "unreliable" or false factual "data" in any of these pamphlets.

III. The Proceedings in the Court of Appeals

On May 12, 1995, the United States Court of Appeals for the Sixth Circuit reversed the judgment of the district court and vacated the district court's permanent injunction against implementation and enforcement of Issue 3, thereby permitting the citizens of Cincinnati, instead of the City Council, to determine democratically the efficacy of granting protected status to homosexuals under the City's anti-discrimination laws. Pet. at 26a-45a and 46a-108a. The court of appeals concluded at the outset of its opinion that since "most, if not all, of the lower court's findings . . . constituted ultimate facts and interrelated applications of law, sociological judgments mixed questions of law and fact, and/or fact, and findings designated to support 'constitutional facts' " – such findings were subject to plenary review. Pet. 33a.

Rejecting the district court's contention that Issue 3 denied petitioners their "fundamental right to equal participation in the political process," the court of appeals held that Issue 3 deprived "no one of the right to vote, nor did it reduce the relative weight of any person's vote," and enabled homosexuals to continue to vote for City Council members and to lobby those Council members concerning issues of interest. Pet. at 40a-41a. Importantly, the only effect upon the citizens of Cincinnati mentioned by the district court "was to render futile the lobbying of Council for preferential enactments of homosexuals *qua* homosexuals because the electorate placed the enactment of such legislation beyond the scope of Council's authority" – an effect which the Sixth Circuit declared, "does not rise to constitutional dimensions." Pet. at 41a. The Sixth Circuit concluded "that those who opposed Issue 3 simply lost one battle of an ongoing political dispute." *Id.* Moreover, far from "altering" the political process within the City of Cincinnati, Issue 3 is a straightforward and unexceptional example of how the political process works.

The court of appeals also rejected the district court's "novel" conclusion that homosexuals comprise a "quasi-suspect" class. Pet. at 35a. Joining "every circuit court which has addressed the issue," the Sixth Circuit concluded that "homosexuals are entitled to no special constitutional protection . . . because the conduct which places them in that class is not constitutionally protected." *Id.* The Sixth Circuit opinion rejected the notion that homosexuals are distinguished by their "sexual orientation" rather than by any particular conduct, and noted that neither Issue 3 nor other laws can successfully be drafted to burden or penalize a particular group "whose identity is defined by subjective and unapparent

characteristics such as innate desires, drives and thoughts." Pet. at 36a.

Lastly, the court of appeals held that the district court "erroneously ruled that [Issue 3] did not rationally relate to any permissible purpose" and that there were legitimate governmental interests advanced in Issue 3. Pet. at 43a-44a. The court of appeals concluded that Issue 3 "furthered a litany of valid community interests," including: (1) the encouragement of associational liberty of Cincinnati citizens by eliminating exposure to the punishment mandated by the HRO against those who elected to disassociate themselves from homosexuals; (2) the reduction of governmental regulation of the private and economic conduct of Cincinnati citizens; (3) the expansion of the degree of personal autonomy and collective popular sovereignty legally permitted with respect to questions of individual conscience, private religious convictions and other profoundly personal and deeply fundamental moral issues; and (4) the return of the municipal government to a position of neutrality with respect to homosexuality. *Id.*[4] The court of appeals also properly rejected the district court's conclusion that Issue 3 violated the First Amendment and was void for vagueness.

During the pendency of the Sixth Circuit appeal, on March 8, 1995, the City Council amended the HRO to

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[4] In addition, the court of appeals also noted, "Even if [Issue 3] is construed to reflect the majority's moral views respecting homosexuality, the Supreme Court has dictated such articulations to constitute a legitimate governmental interest. *Bowers [v. Hardwick]*, 478 U.S. [186,] at 196, 106 S. Ct. 2846 [(1986)] (a state criminal sodomy statute is justified as an expression of the belief of the electoral majority that homosexuality is immoral)." Pet. at 44a n.10.

eliminate any protections for "sexual orientation" discrimination, thus clarifying that neither heterosexuals nor homosexuals may seek the special protections of that law.

On June 17, 1996, this Court granted a petition for a writ of certiorari, vacated the decision of the Sixth Circuit, and remanded the case for further consideration in light of its decision in *Romer v. Evans*, 517 U.S. 620 (1996).

On remand, the Sixth Circuit concluded that Issue 3 satisfied the constitutional standard announced in *Romer*. The court of appeals concluded that Amendment 2 and Issue 3 "involved substantially different enactments of entirely distinct scope and impact, which conceptually and analytically distinguished the constitutional posture of the two measures." Pet. at 9a. Applying the equal protection principles announced in *Romer*, the court of appeals concluded that Issue 3 suffered none of the constitutional defects that rendered Amendment 2 invalid. Specifically, the Sixth Circuit explained that whereas Amendment 2 " 'prohibit[ed] all legislative, executive or judicial action at any level of state or local government designed to protect the named class,' " Pet. at 10a (quoting *Romer*, 517 U.S. at 624), "the Cincinnati Charter Amendment [Issue 3] constituted a direct expression of the local community will on a subject of direct consequences to the voters." Pet. at 15a. Extending *Romer* to invalidate purely local referenda of this sort "would disenfranchise the voters of their most fundamental right which is the very foundation of the democratic form of government, even through the lowest (and most populist) organs and avenues of state government, to vote to override or preempt any policy or practice implemented or contemplated by their subordinate civil servants to bestow special rights, protections, and/or privileges

upon a group of people who do not compromise a suspect or a quasi-suspect class and hence are not constitutionally entitled to any special favorable legal status." Pet. at 17a-18a. Moreover, the Sixth Circuit held that in contrast to Amendment 2's " '[s]weeping and comprehensive' " language, Pet. at 10a (quoting *Romer*, 517 U.S. at 627), Issue 3's "narrow, restrictive language could not be construed to deprive homosexuals of legal protections even under municipal law, but instead eliminated only 'special class status' and 'preferential treatment' for gays as gays under Cincinnati ordinances and policies, leaving untouched the application, to gay citizens, of any and all legal rights generally accorded by the municipal government to all persons as persons." Pet. at 13a-14a.[5]

The Sixth Circuit also concluded that Issue 3 was rationally related to legitimate governmental interests. The court of appeals noted that this Court had rejected the interests cited by the defendants in *Romer* because "[t]he breadth of the Amendment [was] so far removed from these particular justifications that . . . it [was] impossible to credit them." Pet. at 19a (quoting *Romer*, 517 U.S. at 635). The Sixth Circuit explained that "[a] state law which prevents local voters or their representatives, against their will, from granting special rights to gays, cannot be rationally justified by cost savings and associational liberties which the majority of citizens in those communities do not want." Pet. at 20a. In contrast, Issue 3 "constituted local legislation of purely local scope." *Id.* The court elaborated: "[a]s such, the City's voters had

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[5] Contrary to petitioners' assertion, the court below expressly noted that "the *Romer* Court did not rely upon the potential universally exclusive effect to invalidate the measure. . . . " Pet. 11a.

clear, actual, and direct individual and collective interests in that measure, and in the potential cost savings and other contingent benefits which could result from that local law." *Id.* Specifically, the court held that one legitimate governmental interest that was reasonably related to the passage of Issue 3 was the elimination of expenditures of "public and private resources to guarantee and enforce non-discrimination against gays in local commercial transactions and social intercourse." *Id.*

On February 5, 1998, the full Sixth Circuit rejected petitioners' suggestion for rehearing *en banc*. Pet. App. 126a. Judge Boggs wrote a concurrence in which he stated, "*Romer's* holding is simple: a state may not, by constitutional amendment, prohibit a municipal government from enacting ordinances conferring benefits or protections on gay residents." Pet. App. 127a. Specifically, Judge Boggs recognized that "if in *Romer* the Supreme Court held that cities may choose to enact gay-right ordinances without nullification by state constitutional amendment, it did not hold that cities *must* choose to do so. It is not constitutionally offensive that over time some cities (*e.g.*, Aspen, Boulder, and Denver) will pass such ordinances, while others (*e.g.*, Cincinnati) will not." Pet. App. at 128a (emphasis in original). Additionally, Judge Boggs provided several examples of the litany of legitimate governmental interests that were advanced by Issue 3, such as a desire to avoid increased legal exposure for small businesses, the advancement of libertarian beliefs, the fear of increased covert discrimination, and the exercise of associational rights by individual citizens.

Judge Gilman, writing on behalf of five other members of the court of appeals, filed a dissent.

REASONS FOR DENYING THE WRIT

I. Petitioners Have Failed To Satisfy Any of The Traditional Grounds Warranting This Court's Review.

Petitioners' sole basis for seeking review in this Court is their contention that the surface similarities between Issue 3 and Colorado's Amendment 2, struck down in *Romer v. Evans*, 517 U.S. 620 (1996), render Issue 3 *ipso facto* unconstitutional. Petitioners, however, never even attempt to refute the Sixth Circuit's thoughtful and painstaking explanation of why, notwithstanding this superficial resemblance, Issue 3 fundamentally differs from Colorado's Amendment 2 and therefore does not run afoul of either the letter or underlying rationale of the Court's *Romer* decision. Nor can petitioners credibly maintain that the Sixth Circuit's decision has doctrinal or public policy significance beyond the four corners of this case or is otherwise necessary to maintain uniformity of decisions with other federal courts. The decision obviously has no such broader significance since it is plainly not in tension with any opinion of any other federal court and no law analogous to Issue 3 has ever been enacted anywhere else. That being so, petitioners have failed to satisfy any of the traditional grounds for granting a petition for a writ of certiorari. In short, to the extent there is any ambiguity as to the scope of this Court's decision in *Romer*, these issues should be resolved in the first instance by the lower federal courts in discrete factual contexts.

II. Issue 3 Is Fully Consistent With *Romer's* Equal Protection Principle.

In *Romer*, this Court held that Colorado's statewide effort to force local communities, against their will, to deny homosexuals any opportunity for a "claim of discrimination" constituted a "literal violation" of the Equal Protection Clause and was unsupported by a rational basis. *Romer*, 517 U.S. at 627-36; Pet. at 14a-15a, 17a-20a. In this case, the people of a local community have decided for themselves not to grant homosexuality the "minority or protected status" that the local city council had bestowed on it approximately one year before. Petitioners' effort to extend *Romer* to this purely local measure thus necessarily rests upon one of two wholly untenable understandings of the Fourteenth Amendment: either (1) the Equal Protection Clause prohibits any decision to repeal or foreclose laws granting homosexuals "minority or protected status" or (2) it prohibits local electorates from directing their employee representatives to deny such status, even though those representatives themselves can voluntarily deny protected status to homosexuals. The first proposition is belied by both common sense and the decision of the United States Congress and 41 states to decline to confer protected status upon homosexuals. Petitioners' second contention would turn the "critical postulate that sovereignty is vested in the people" on its head. *See U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 794 (1995). Petitioners' argument rests on the bizarre contention that the people of Cincinnati are constitutionally disabled from doing precisely what the Cincinnati City Council may do. Nothing in this Court's decision in *Romer*, however, suggests, much less compels, such a patently erroneous result.

Romer merely held that each locality was entitled to decide for itself the contentious political issue of granting protected status to homosexuals. Petitioners seek to convert this straightforward principle into a *uniform, national requirement* that would disable all localities from repealing or denying civil rights protections for homosexuals. Specifically, petitioners maintain that Issue 3 violates the Fourteenth Amendment because it makes it "more difficult" for homosexuals to obtain "minority or protected status."[6] Particularly since *Romer* expressly disclaimed the notion that it was bestowing "special rights" on homosexuals, but was announcing a general equal protection principle applicable to all groups, petitioners' proposed reading of that decision would render invalid every referendum creating classifications which "disadvantage" *any* group relative to others. Under this view, gun owners, smokers, teenagers and any other "group" could challenge any local law that does not extend to them a government benefit available to others. Any such limitation on government aid would necessarily make it "more difficult" – indeed, impossible – for the affected group to "seek aid from the government." 517 U.S. at 633. As the *Romer* court emphasized, however, "*most* legislation classifies for one purpose or another, with resulting disadvantage to various groups or persons." 517 U.S. at 631 (emphasis added). So long as the distinction drawn does not disadvantage a suspect class and rationally

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[6] Although petitioners boldly proclaim that it is clearly "more difficult" to reverse the electorate's decision on denying gay rights than to reverse an analogous city council decision, they offer no objective support for this proposition. The "difficulty" identified in *Romer*, forcing appeals to citizens that were strangers to the community, is not implicated in any way by Issue 3.

advances a legitimate governmental interest, the law does not violate the Equal Protection Clause. As the court of appeals found, Issue 3 amply satisfies these requirements.

Nothing in *Romer* (or any other of this Court's opinions) in any way suggests that the substantive decision to exclude homosexuality from civil rights protections extended to other criteria is inherently irrational or that such a permissible substantive decision somehow becomes transformed into a "literal violation" simply because it is made by the people through popular referendum, rather than elected representatives exercising their *delegated* powers. Rather, as the Sixth Circuit correctly noted, the only identified flaw in Colorado's Amendment 2 was that the state imposed a uniform view of homosexuals' entitlement to "claims of discrimination" on all local communities. Pet. at 12a. This statewide coercion both created a "special disability" for homosexuals by forcing them alone to "enlist[ ] the citizenry of Colorado to amend the state constitution" and rendered Amendment 2 irrational because "[a] state law which prevents local voters or their representatives, against their will, from granting special rights to gays, cannot be rationally justified by cost savings and associational liberties which the majority of citizens in those communities do not want." *Romer*, 517 U.S. at 631; Pet. at 20a. Moreover, the dissenting opinion in *Romer* characterized, without correction, the majority opinion as holding that the constitutional harm was the state's resolution of a local issue.[7] Thus,

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[7] *See, e.g.*, 517 U.S. at 639-40 ("the same 'rational basis' . . . which renders constitutional the *substantive discrimination* . . . also automatically suffices to sustain what might be called the *electoral – procedural discrimination* against them (i.e., the fact that they must go to the *state level* to get this changed).") (emphasis in original); *id.* at 647 ("because such a law prevents the adversely affected group – whether drug addicts, or smokers, or gun owners, or motorcyclists – from changing the policy thus established in 'each of [the] parts' of the *state*.") (emphasis added).

Romer simply condemned state efforts to prevent local communities from taking diverse approaches to the issue of gay rights protections. It plainly does not, as petitioners assert, impose a national *requirement* that local communities *uniformly* grant (or at least not repeal) such protections.

Petitioners maintain that the Sixth Circuit's decision "supports the remarkable contention . . . that application of equal protection principles depends on the level of government at which the challenged action takes place." Pet. at 24. But nothing in the decision below supports such a notion or otherwise suggests that equal protection scrutiny is somehow less rigorous for local communities than it is for states. The Sixth Circuit simply recognized that there is a difference under *Romer* between state interference with local decisionmaking and democratic resolution of local issues by the local community itself. Thus, the application of the *same* equal protection principles to these different situations may and should lead to different results. The question here, however, is whether *Romer* will be grossly extended to hold that the *electorate's* "interference" with the policy decisions of its subordinate representatives is somehow forbidden by a Constitution premised on popular sovereignty.

No case anywhere at any time has ever embraced the heresy that the people of a community cannot order their legislature to take action permitted by the Constitution. As Justice Scalia observed,

> [T]he consequence of holding this provision unconstitutional would be that nowhere in the

> country may the people decide, in democratic fashion, not to accord special protection to homosexuals. Unelected heads of city departments and agencies, who are in other respects (as democratic theory requires) subject to the control of the people, must, where special protection for homosexuals are concerned, be permitted to do what they please. This is such an absurd proposition that *Romer*, which did not involve the issue, cannot possibly be thought to have embraced it.

Equality Foundation of Greater Cincinnati, Inc. v. City of Cincinnati, 518 U.S. 1001 (1996) (Scalia, J., dissenting). Although it is certainly true that "popular referendum[s] [are not] *immunize[d]*" from constitutional scrutiny, *Hunter v. Erickson*, 393 U.S. 385, 392 (1969) (emphasis added), it is plainly wrong to suggest that Issue 3 is unconstitutional *solely because* it was directly enacted by the people of Cincinnati.

There is, however, support for the proposition that statewide repeals of local laws aimed at addressing local problems can create special disabilities that violate the Equal Protection Clause. For example, in *Washington v. Seattle School Dist., No. 1*, 458 U.S. 457 (1982), this Court struck down a statewide anti-busing initiative because "[b]y placing power over desegregative busing at the state level," the "initiative lodg[ed] decision making authority over the question at a new and remote level of government." 458 U.S. at 479, 483. Like the homosexuals in Aspen and Boulder, "proponents of desegregative busing in smaller communities such as Tacoma or Pasco [needed to] obtain statewide support . . . to desegregate the schools in their communities." *Id.* at 484 n.27. In short, the only identified injury in *Romer* or *Seattle* was that a local issue had been removed to the "*state level*," a

"new and remote *level* of government." *Id.* at 479, 483 (emphasis added). As a purely local measure, Issue 3 does not create any such disability.

It is therefore necessarily constitutional because, as the Sixth Circuit correctly noted, nothing in *Romer* supports the bizarre proposition that the local electorate is constitutionally *inferior* to its employee representatives and thus somehow has more limited authority to make gay rights decisions than the city council, which derives all its authority from that electorate. Pet. at 17a-18a. To the contrary, *Romer* never hints that Amendment 2's constitutionality was affected because it was embodied in a citizen's initiative, rather than legislative enactment, and this Court has often rejected the notion that the constitutionality of a measure could possibly be adversely affected because it was the product of direct democratic action. As the Court recently stated, "[w]e are aware of no case that would even suggest that the validity of a state law under the Federal Constitution would depend at all on whether the state law was passed by the state legislature or by the people directly through amendment of the state constitution." *U.S. Term Limits*, 514 U.S. at 809 n.19; *see also* Pet. at 15a-16a (and cases cited). As the Court in *James v. Valtierra*, 402 U.S. 137, 142 (1971), explained with respect to a local referendum:

> But of course a lawmaking procedure that "disadvantages" a particular group does not always deny equal protection. Under any such holding, presumably a State would not be able to require referendums on any subject unless referendums were required on all because they would always disadvantage some group.

Thus, Amendment 2 imposed an unconstitutional "special disability" solely because it meant that homosexuals in electoral subunits like Aspen could achieve civil

rights protections "only by enlisting the citizenry of Colorado to amend the state constitution . . . no matter how local or discrete the harm." *Romer*, 517 U.S. at 631. But *Romer* in no way suggested that it was in any way problematic for the *local* electorate to make a local decision, thus necessitating "enlisting" them to reverse that decision. Nor could it have done so without violating the "critical postulate that sovereignty is vested in the people." *U.S. Term Limits*, 514 U.S. at 794. Rather, the people have the unfettered authority to guide their representatives' efforts towards any constitutionally permissible end: they may require their legislators to take any action the Constitution does not forbid or, as here, forbid them from taking any action the Constitution does not require.

This basic truth was noted as early as *Marbury v. Madison*: "[T]he people have an original right to establish, for their future government, such principles as, in their opinion, shall most conduce to their own happiness. . . . " 5 U.S. (1 Cranch) 137, 176 (1803). More recently, the Court has observed that "[t]he referendum . . . is a means for direct political participation, allowing the people the final decision, amounting to a veto power, over enactments of representative bodies. The practice is designed to 'give citizens a voice on questions of public policy.' " *City of Eastlake v. Forest City Enters.*, 426 U.S. 668, 673 (1976) (quoting *James*, 402 U.S. at 141); *see also James*, 402 U.S. at 141 ("Provisions for referendums demonstrate devotion to democracy, not to bias, discrimination, or prejudice.").

The people of various localities are thus entirely free to use their constitutions and charter amendments to prevent their local legislatures from passing laws that the people find unwarranted or inappropriate. This, indeed, is what constitutions do. The federal Constitution, and in particular the Bill of Rights, is nothing more than a series

of directives from the sovereign people to their employee representatives regarding the types of laws the representatives may enact. According to petitioners' logic, the First Amendment's directive to "Congress" that it "shall make no law respecting an establishment of religion," grossly violates the rights of those who desire or benefit from religious establishments because it makes it "more difficult for [one] group of citizens than for all others to seek aid from the government." Thus, laws akin to Issue 3 are not only "within our constitutional tradition," they are within our Constitution. *Romer*, 517 U.S. at 633. Just as the First Amendment permissibly constrains federal representatives from passing laws that interfere with the people's freedom to act on their religious beliefs, so too does Issue 3 permissibly direct Cincinnati representatives not to pass laws that interfere with the people's freedom to act on their religious or other beliefs concerning homosexual behaviors and lifestyle.

To be sure, *Romer* stated that each level or "part" of government within a state must be free to decide gay rights issues for themselves, but this hardly suggests that each *component* of government *within* a local subunit must be free to make gay rights decisions contrary to their superior's directives. As the Sixth Circuit noted, were it otherwise, the Cincinnati City Council could not direct the *City Manager* to reverse his gay rights policies because it would then be "more difficult" for homosexuals to seek aid from the government. Pet. at 16a-17a n.9. But since the Cincinnati City Council is superior to the city bureaucracy within the local governmental structure, it may command the city bureaucracy not to extend any benefits to certain groups unless those benefits are constitutionally mandated. By the same token, since the citizens of Cincinnati are superior to the city council within the

local governmental structure, they may command the city council not to extend any benefits to certain groups unless those benefits are constitutionally mandated.

Indeed, extending *Romer's* equal protection principle to invalidate local electoral decisions would be even more revolutionary than the Colorado Supreme Court's "fundamental political rights" theory that the *Romer* Court refused to embrace. 517 U.S. at 625. As petitioners correctly note, the *Romer* principle articulates a "literal violation" of the Equal Protection Clause, and consequently, no justification can save it. Pet. at 15. Thus, particularly since gays enjoy no "special" equal protection rights, local electorates would be powerless to deny *any* demand by *any* special interest group (not just "independently identifiable groups"), no matter how compelling the reason for rejecting it or how unworthy the group. Under petitioners' Equal Protection Clause, local communities could not, for example, ban veteran preferences even if they believed they had an unwarranted disparate impact on females. *Cf. Personnel Adm'r of Mass. v. Feeney*, 442 U.S. 256 (1979). Any such action would make it "more difficult for one group of citizens [veterans] than for all others to seek aid from the government" and thus would be "a denial of equal protection of the laws in the most literal sense." Pet. at 15 (quoting *Romer*, 517 U.S. at 633).

As this example illustrates, moreover, the Equal Protection regime hypothesized by petitioners would not only invalidate virtually all democratic policy choices, but would quite literally be impossible to implement. Government simply cannot be "open and impartial" to *all* competing groups because such groups often make *conflicting* demands. 517 U.S. at 633. If the Cincinnati electorate or City Council adopts veteran preferences, it is not

open and impartial to women's groups seeking the government's assistance in ending a regime with such an identifiable disparate impact. But if the City Council favors the women's groups, it will not be open and impartial to veterans' groups. If it favors unions in city employment it will have closed its doors to non-union members (and vice versa); if it favors gun owners, it will have closed its doors to gun-control advocates (and vice versa); if it grants preferential treatment to any group, it will have closed its doors to the other adversely affected groups seeking nondiscriminatory treatment (and vice versa).

Contrary to petitioners' attempted distortion, then, the Sixth Circuit did not suggest that local electorates are constitutionally superior to local or state governments, but only that they are constitutionally *equivalent* and thus a law is not rendered unconstitutional simply because it is enacted by the people. Since the Cincinnati City Council and other municipal legislatures in Colorado are concededly free to disagree with the Aspen City Council about the desirability of gay rights protections, the Cincinnati electorate is also constitutionally free to disagree with Aspen about the desirability of such laws. If petitioners had enacted gay rights *protections* through a Charter Amendment, rather than a municipal statute, this would obviously not affect the constitutional analysis of that enactment, and there is no principled reason for a different result here.

We note that if all of the foregoing is wrong and *Romer* does in fact prohibit local electorates from making the same policy decisions as their representatives, then this Court should reconsider its decision in that case.

III. Issue 3 Is Rationally Related to Legitimate Government Interests.

Petitioners also maintain that Issue 3 simply must be irrational because *Romer* holds that all laws excluding only homosexuality from otherwise available civil rights protections cannot be supported by the legitimate interests in easing the financial burdens of civil rights enforcement and enhancing associational freedoms, but must be deemed to reflect nothing but irrational "animus." Pet. at 18-22. The short answer to this contention is that Issue 3 is supported by all the legitimate interests that have motivated Congress and 41 state legislatures to exclude homosexuality from the civil rights protections granted on the basis of numerous other criteria, as well as the interests supporting any legislative decision to repeal only homosexuality as a protected category. As the Court has often noted, there is no cognizable difference between a decision to repeal an existing protection that is not constitutionally mandated and a decision not to enact such a protection in the first place. Indeed, it is incontrovertible that "the Equal Protection Clause is not violated by the mere repeal of [civil rights] legislation or policies that were not required by the Constitution in the first place." *Crawford v. Board of Educ. of City of Los Angeles*, 458 U.S. 527, 538 (1982). *See also Dayton Bd. of Educ. v. Brinkman*, 433 U.S. 406, 414 (1977) ("If the Board was not under such a duty, then the rescission of the initial action in and of itself cannot be a constitutional violation."). Since it is implicitly conceded that *Romer* did not invalidate *legislative* denials or repeals, this conclusively establishes that such "singling out" of homosexuality for "disadvantageous" treatment is not irrational or a product of impermissible *animus*. *See* Pet. at 14a n.8.

Indeed, all the reasons that support a decision to exclude homosexual orientation from generally applicable nondiscrimination laws such as Title VII, or to repeal previously-enacted protections of this sort, necessarily also support popular amendments instructing legislators not to enact, and to repeal, such protections. If such popular initiatives *necessarily* rest on impermissible motivations, so too does legislation embracing precisely the same decision. And if government is constitutionally compelled to enact (or at least retain) prohibitions against *private* discrimination, then necessarily government *itself* must also refrain from discriminating against homosexuals in laws and policies governing marriage, child custody, adoption, and the like. But *Romer*, of course, did not suggest that legislative repeals of civil rights protections were problematical, much less *per se* irrational. Nor did it suggest that there was anything irrational about laws directly discriminating against homosexuals in such matters as marriage, but all such laws are necessarily premised on nothing other than moral reservations about homosexuality. Thus, contrary to petitioners' suggestion, *Romer* cannot stand for the general condemnation of all government actions which withdraw civil rights protections for gays, so each case must be judged on its own merits.

As the Sixth Circuit correctly noted, *Romer* did not and could not suggest that exclusion of homosexuality from civil rights laws fails to further a political jurisdiction's legitimate interest in preserving the financial resources of those defending and enforcing civil rights suits or preserving citizens' traditional freedom to associate with employees, tenants or roommates of their choice. Pet. at 21a. It simply held that these interests, given the "breadth of the Amendment," were so "far removed from

these particular justifications" that the Court could not "credit them." *Romer*, 517 U.S. at 635. The *reason* the interests supporting Amendment 2's sweeping prohibition were so attenuated and not credible is because they were imposed by people *outside* of Aspen and similar communities, who did *not* suffer such costs or deprivations, on people *within* the local communities who were perfectly willing to expend their tax dollars and sacrifice their personal freedoms to the cause of gay rights. 517 U.S. at 635; Pet. at 19a. Strangers to Aspen have no legitimate or plausible interest in "protecting" Aspen's citizens from their own local democratic processes, so the only possible justification for Amendment 2 was irrational *animus*. But this rationale has no application where, as here, those burdened by the law are the same people who struck the balance between costly deprivations of freedom and gay rights.

In such circumstances, laws denying homosexuality "minority or protected status" are eminently reasonable. There is always a trade-off between expanding civil rights laws and preserving both scarce financial resources and associational rights. Civil rights laws protecting homosexuals necessarily deny employers and landlords their traditional freedom to associate with whomever they please and to attach significance to a sexual behavior or lifestyle that they may believe is inappropriate or sinful. By prohibiting such government coercion, Issue 3 preserves the citizenry's traditional freedom to associate and to act on sincerely-held religious or moral beliefs concerning the propriety of certain behavior. While enhancing freedom is always rational, it serves a particularly compelling interest in the context presented here. Eliminating the liberty of landlords and employers to take account of homosexuality sends the unmistakable

message that homosexual behavior, like race, is a characteristic which only an irrational bigot would consider. By restoring government neutrality on this difficult and divisive moral issue, Issue 3 promotes freedom and diversity by allowing different groups in the community to hold, and act on, different views on this question. Thus, as Judge Boggs' opinion carefully explains, Issue 3 reasonably garnered the support not only of citizens who themselves had moral reservations about homosexuality but also of those who did not wish to interfere with the freedom of those who did possess such reservations. Pet. App. 129a.[8] In this regard, it is important to recognize that Issue 3 in no way authorizes, much less compels, any discrimination against any homosexual in any walk of life: it simply refrains from affirmatively prohibiting such action.[9]

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[8] While petitioners believe that homosexuality is morally irrelevant, that assertion is itself necessarily a profound, and controversial, moral judgment. Cincinnati has every right to not impose petitioners' moral code on others in the community who may disagree with it.

[9] Of course, although the issue is not presented here, even if Issue 3 did affirmatively penalize homosexuals because of the community's collective moral views, this would be eminently permissible under *Bowers v. Hardwick*, 478 U.S. 186, 196 (1986). If the government has a rational and legitimate basis for imprisoning monogamous adults whose only crime is consensual sexual behavior in the privacy of their own apartments, it cannot be irrational for the government to take the far less draconian step of simply refraining from penalizing private actors who prefer not to rent their apartments to people who engage in such behavior. Indeed, it is manifestly irrational to conclude that the government must encourage and sanction homosexual relationships by granting them affirmative civil rights protections, but, at the same time, conclude that the government is entirely free to criminally penalize the natural,

Since Issue 3, unlike Amendment 2, therefore most certainly "can be explained by reference to legitimate public policies," rational basis review does not permit the federal judiciary to assume as a matter of law that 62% of Cincinnati voters were not motivated by such legitimate policies, but were stirred by "animus" or a " 'bare- . . . desire to harm' " homosexuals. *Romer*, 517 U.S. at 634, 644. *FCC v. Beach Communications, Inc.*, 508 U.S. 307, 313-14 (1993). Contrary to petitioners' suggestion, federal courts cannot invalidate presumptively valid laws as reflecting "animus" *even though* those laws further reasonable policies, but may ascribe such impermissible motives only when, as in *Romer*, the Court concludes that no such reasonable ends support the challenged policy and thus the policy is necessarily "inexplicable by anything but animus." 517 U.S. at 632. *FCC v. Beach*, 508 U.S. at 314.

Apparently recognizing this, petitioners now seem to suggest that Cincinnati somehow forfeited the ability to advance the legitimate government interests served by Issue 3 unless it simultaneously did away with *all* civil rights protections on *all* bases. That is, petitioners suggest that Cincinnati cannot advance the cost savings and freedom-enhancing reasons served by Issue 3 because those same benefits would be derived from excluding, say, racial minorities from civil rights protections and Cincinnati did not exclude race as a protected criterion. Pet. at 10. It is self-evident, however, that the government may exclude, for example, drug addicts from the protections of civil rights laws without being constitutionally obliged

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consensual results of those relationships through sodomy laws. Yet this is precisely the state of constitutional incoherence that would result from petitioners' interpretation of *Romer*.

also to exclude women and racial minorities from such protections, even though the reasons justifying an exclusion of drug addicts could also support excluding these other groups. This is because it is a basic maxim of rational basis review that such line-drawing, establishing eligibility for scarce public benefits such as civil rights protections, "is a matter for legislative, rather than judicial, consideration." *United States R.R. Retirement Bd. v. Fritz*, 449 U.S. 166, 179 (1980); *Railway Express Agency, Inc. v. People of State of New York*, 336 U.S. 106, 110 (1949) ("It is no requirement of equal protection that all evils of the same genus be eradicated or none at all."). Thus, challenging the underinclusiveness of a legislative classification affords no grounds for invalidation under rational basis review.[10] Indeed, under petitioners idiosyncratic understanding of rational basis review, Issue 3's prohibition of *"preferential treatment"* for homosexuals is unconstitutional, since a similar disability is not imposed on blacks, women, veterans, city residents or any other group currently receiving such preferences in municipal employment.

In any event, it is unquestionably reasonable to treat homosexuality differently from other protected criteria, such as skin color and gender, because it is a behavior or lifestyle. It therefore can rationally be viewed as reflecting on "the content of one's character." Martin Luther

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[10] *See, e.g., Dandridge v. Williams*, 397 U.S. 471, 485 (1970) ("If the classification has some rational basis, it does not offend the Constitution simply because the classification is not made with mathematical nicety or because in practice, it results in some inequality.") (internal quotations omitted); *Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456 (1981); *Katzenbach v. Morgan*, 384 U.S. 641, 657 (1966); *Williamson v. Lee Optical of Okla., Inc.*, 348 U.S. 483, 489 (1955).

King, Jr., Speech at the Civil Rights March on Washington, D.C. (Aug. 28, 1963). It is thus something to which eminently reasonable people can attach negative significance, pursuant to venerable moral and religious principles. The state, in turn, may rationally seek not to interfere with such principles or to equate them with racial bigotry.

To be sure, as petitioners note, a local community probably could not deny fire protection services only to senior citizens under the Fourteenth Amendment. Pet. at 22. But a community most assuredly may instruct its city council to exclude "old age" as a protected civil rights criterion, regardless of whether it also excludes race as a protected basis. Pet. at 22. It can do so pursuant to the same legitimate cost-benefit analysis which led the Cincinnati City Council to exclude "political affiliation" from the protections of the Human Rights Ordinance, even though, unlike homosexuality, such affiliation is constitutionally protected against governmental discrimination. *See* Pet. at 9a. Notwithstanding petitioners' campaign sloganeering, so limiting the scope of civil rights laws hardly renders the elderly or Republicans unequal to everyone else. It simply denies them an additional basis for invoking "minority or protected status." Similarly, a black lesbian Democrat has the same right as all other Cincinnati citizens to allege racial or gender-based discrimination, but cannot invoke either her political affiliation or, after Issue 3, her homosexuality as an *additional* basis for claiming "minority or protected status." This does not create any unconstitutional inequality particularly since, as the Sixth Circuit correctly recognized, Issue 3 was carefully limited to deny homosexuals only "special class status" and "minority or protected status" – in contrast to Amendment 2's sweeping deprivation of

any potential "claim of discrimination." Pet. at 12a-13a. This ensures that Issue 3 cannot be construed to deny homosexuals the benefits of generally applicable laws – the result that so troubled the *Romer* court. *Romer*, 517 U.S. at 623, 629-33; Pet. at 9a-13a.

Thus, all Issue 3 does is eliminate an *additional* legal basis for challenging any adverse action – *i.e.*, discrimination on the basis of homosexuality. Such additional legal protections are indeed special rights because many characteristics, behaviors and lifestyles protected by the Constitution and/or federal civil rights law – political affiliation, illegitimacy, drug addiction, alcoholism – are unprotected by the Human Rights Ordinance or any other Cincinnati law prohibiting private discrimination. Indeed, prior to the enactment of the Human Rights Ordinance in 1992 – which it is uncontested was passed, and has been used, solely to prohibit homosexual discrimination – no Cincinnati law prohibited even racial or gender-based discrimination. Thus, in the wake of Issue 3, homosexuals are in precisely the same position they and all other groups were in prior to passage of the Human Rights Ordinance, and in precisely the same position as homosexuals in 41 states and federal courts – without special protections for one characteristic which defines one of the societal groups to which they claim membership. This is in stark contrast to Amendment 2, which was enacted against a backdrop of a diverse patchwork of well-established protections for homosexuals, and well-entrenched protections for an "extensive catalogue of traits" other than homosexuality. *Romer*, 517 U.S. 628-30. Unlike Amendment 2, then, Issue 3 does not make homosexuals a "stranger to its laws," but simply does not add to Cincinnati laws an additional protection with the

specific purpose and effect of aiding homosexuals *qua* homosexuals. *Romer*, 517 U.S. at 635.

Notwithstanding petitioners' apocalyptic contrary rhetoric, then, the Sixth Circuit was entirely correct that Issue 3 simply fails to bestow on homosexuals an additional protection premised on their status as homosexuals, but it in no way denies them the benefits of civil service or other laws available to others.

Finally, the fact that Issue 3 is contained in a popularly-enacted Charter Amendment, rather than a legislatively-enacted repeal, does not render it any more "discriminatory" than a legislative repeal or otherwise affect the constitutional analysis. All concede that the *only* way Cincinnati citizens can make policy determinations concerning what their laws should be is by drafting laws instructing the City Council on the permissible scope of its law-making powers. Thus, invalidating Issue 3 because it is phrased as a directive to the legislature on the scope of permissible laws is no different than prohibiting citizens from governing themselves.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

DATED: June 23, 1998

Respectfully submitted,

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No. 97-1795

IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

EQUALITY FOUNDATION OF GREATER CINCINNATI, INC., RICHARD BUCHANAN, CHAD BUSH, EDWIN GREENE, RITA MATHIS, ROGER ASTERINO, and H.O.M.E., INC.,

Petitioners,

—v.—

THE CITY OF CINCINNATI, EQUAL RIGHTS NOT SPECIAL RIGHTS, MARK MILLER, THOMAS E. BRINKMAN, JR., and ALBERT MOORE,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

REPLY BRIEF FOR PETITIONERS

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REPLY BRIEF FOR PETITIONERS

Petitioners submit this Reply Brief to underscore the fundamental parity of Cincinnati's Issue 3 with the amendment this Court struck in *Romer v. Evans*, 517 U.S. 620 (1996); the application of *Romer*'s holdings to this case; and the pressing need for the conflict between *Romer* and the ruling below to be resolved to prevent further, serious injury to individuals, compromise to this Court's ruling in *Romer*, and damage to the integrity of the Equal Protection Clause.

I. The Cincinnati and Colorado Amendments Are Indistinguishable in All Material Respects.

Respondents' attempts to distinguish the Cincinnati charter amendment at issue here from Colorado's Amendment 2 are unavailing. The two measures are the same in the following dispositive ways:

- Issue 3, like Amendment 2, erects an ongoing ban on all government bodies from protecting lesbians, gay men, and bisexuals from discrimination. Respondent Equal Rights Not Special Rights (ERNSR) erroneously treats Issue 3 as merely repealing extant legal protections for lesbians, gay men, and bisexuals, and as a decision by a government body declining to enact a law protecting gay people from discrimination. ERNSR Brief in Opposition at 13-16, 22-23, 25, 28-29. In fact, Issue 3's text, like Amendment 2's, prospectively bans protective measures so that public officials within its jurisdiction can *never* establish any protections for gay people. Both measures operate to "forbid all laws or policies providing specific protection for gays or lesbians from discrimination." *Romer*, 517 U.S. at 629.
- ERNSR calls Issue 3's ban on "protected status" for gay people a lesser restriction than Amendment 2's ban on a

"claim of discrimination." ERNSR Opp. at 28-29. *See also* Cincinnati Brief in Opposition at 9-10. But enumeration as a "protected status" is "the essential device used to make the duty not to discriminate concrete," *Romer*, 517 U.S. at 628, and thus to provide a "claim of discrimination." *See also Greenwood v. Taft, Stettinius & Hollister*, 105 Ohio App.3d 295, 299, 633 N.E.2d 1030, 1032 (1995). Indeed, the Cincinnati Human Rights Ordinance designates as a "protected status" each trait that gives rise to a discrimination claim. Jt. App. 683. Even ERNSR concedes that Issue 3's preclusion of "protected status" for gay people eliminates a "legal basis for challenging any adverse action — *i.e.*, *discrimination* on the basis of homosexuality." ERNSR Opp. at 29 (emphasis added). Thus, Issue 3, like Amendment 2, denies gay people access to basic antidiscrimination laws and protections.

- Issue 3, like Amendment 2, directs its ban, and thus its injury, *only* at gay people, as respondent City of Cincinnati recognizes. Cincinnati Brief in Opposition at 7; *Romer*, 517 U.S. at 627. Neither amendment returns government to "neutrality" regarding gay people, ERNSR Opp. at 25; indeed, neither even purports to remove sexual orientation as a protected category. Rather, both directly classify and burden only lesbians, gay men, and bisexuals.
- Issue 3, like Amendment 2, changes the jurisdiction's basic governing document to impose its sweeping disabilities on gay people. It prevents *all* government entities in the jurisdiction from protecting gay people in *any* and *all* public and private sector matters, contrary to ERNSR's characterization. ERNSR Opp. at 24, 28-29; *Romer*, 517 U.S. at 629. Thus, Issue 3 amends Cincinnati's charter to impose the same across-the-board

disabilities as the invalidated Colorado amendment sought to effect.

- Issue 3, like Amendment 2, makes it substantially more difficult for gay people than for others to obtain protections from discrimination. ERNSR's suggestion that Issue 3 merely affects the City's Human Rights Ordinance, ERNSR Opp. at 29, is patently incorrect. Several different levels of Cincinnati's government can provide antidiscrimination protections, as ERNSR concedes. *Id.* at 19-20. Constituents can go to the City Council, lobby the City Manager, advocate at any City institution, gather signatures and persuade the public to support an initiative providing protections, or engage the initiative process to propose a protective charter amendment. *Cf. Id.* Gay Cincinnatians have only the last of those options. This relegation to only one, "more difficult" mechanism, *Romer*, 517 U.S. at 633, mimics Amendment 2, which likewise left amendment of the governing document as the only option for gay people to obtain antidiscrimination protections. *Id.* at 631.

In sum, both Issue 3 and Amendment 2 change their respective governing documents to ban categorically all government actors within their jurisdictions from ever protecting lesbians, gay men, and bisexuals against sexual orientation-based discrimination. Both measures "identif[y] persons by a single trait and then den[y] them protection across the board." *Id.* at 633. They not only "withdraw[] from homosexuals, but no others, specific legal protection from the injuries caused by discrimination" but also "forbid[] reinstatement of these laws and policies," making it "more difficult" for gay people ever to obtain protection from their government. *Id.* at 627, 633. As in *Romer*, these characteristics doom Issue 3 as constitutionally flawed, and they require reversal of the Sixth Circuit's decision to uphold Issue 3 despite *Romer*.

II. The Ruling Below Conflicts with *Romer*.

Both measures use the same mechanism to the same effect, but the City and ERNSR insist that Issue 3 can be sustained while its Colorado counterpart could not be. They reach this anomalous conclusion by mischaracterizing the two amendments, as shown above, and then misapplying *Romer*'s literal violation holding and its straightforward rational basis review of a virtually identical classification.

When this Court held that Amendment 2's singular ban on protections violated the literal terms of the Equal Protection Clause, it never once referred to the level of government restricted by the measure before it. The Court instead said that:

> A law declaring that in general it shall be more difficult for one group of citizens than for all others to seek aid from the government is itself a denial of equal protection of the laws in the most literal sense.

Romer, 517 U.S. at 633. Although respondents would confine this holding to statewide measures, the Court's opinion does no such thing. Indeed, the Court itself, in its literal violation discussion, relies on a proposition originally made in a case about a city's discriminatory acts. *Id.* at 633-34 (quoting *Skinner v. Oklahoma ex rel. Williamson*, 316 U.S. 535 (1942)(quoting *Yick Wo v. Hopkins*, 118 U.S. 356, 369 (1886))("The guaranty of 'equal protection of the laws is a pledge of the protection of equal laws.'").

Respondents also try to distinguish *Romer* by downplaying the civil rights protections banned by Issue 3, calling them a "government benefit." ERNSR Opp. at 13. But those protections constitute the same type of "aid from government" that Amendment 2 unlawfully foreclosed. By upholding a measure that, like Amendment 2, "declare[s] that in general it shall be more difficult for one group of citizens than for all others to seek aid from the [Cincinnati] government," the Sixth

Circuit's ruling plainly conflicts with *Romer*'s holding that Amendment 2 worked a literal violation of the constitutional equal protection guarantee.

Respondents also gloss over the conflict between the Sixth Circuit's application of rational basis review to Issue 3's classification of lesbians, gay men, and bisexuals and this Court's rational basis review of the same classification in *Romer*. As this Court explains, government must be able to identify a legitimate end that is rationally served when it treats one group of people differently from all others. *Romer*, 517 U.S. at 632-33. The government — including voters — may draw lines in policymaking, but the purpose of the line drawn must be legitimate and the distinction in treatment must rationally serve that legitimate end or the measure will conflict with the Fourteenth Amendment's equal protection guarantee. *Id.*

Respondents suggest that the need for cost-savings — proffered both in *Romer* and here — legitimately and rationally explains Issue 3's classification even though this Court deemed it too "far removed" to explain Amendment 2's parallel discrimination. *Id.* at 1629; Cincinnati Opp. at 14-15; ERNSR Opp. at 24. As their sole support for this flawed analysis, the Sixth Circuit and respondents erroneously portray Amendment 2 as though it only implicated the financial interests of Coloradans in cities with antidiscrimination protections. *Id. See also* App. 20a.

In reality, just as Issue 3 affects the interests of all City residents because it is a citywide measure, Amendment 2 affected all Coloradans. As this Court noted, Amendment 2 banned *all* statewide measures protecting gay people, including: Colorado Executive Order D0035 (1990) (forbidding employment discrimination against state employees based on sexual orientation), Colo. Stat. Ann. §10-3-1104 (1992 Supp.) (prohibiting sexual orientation discrimination by health insurance providers), and "'various provisions prohibiting discrimination based on sexual orientation at state colleges.'" *Romer*, 517 U.S.

at 626-27, 629-30. Respondents' effort to distinguish the measures by their geographical scope is unavailing.

More importantly, *Romer*'s literal violation and rational basis holdings do not turn on the state's regulation of municipalities. Instead, they turn on the clash between Amendment 2's permanent ban on protections for one group of people, which Issue 3 copies, and the Equal Protection Clause's substantive guarantee. ERNSR concedes, as it must, that the same equal protection standard applies to cities as to states. ERNSR Opp. at 15. *Romer* thus does not permit the Sixth Circuit's upholding of Issue 3's copycat ban to stand.

III. The Conflict Between *Romer* and the Ruling Below Involves an Important Federal Question Because Issue 3-Type Measures Threaten to Undermine this Court's Mandate in *Romer*.

Ignoring that this Court reversed and remanded the Sixth Circuit's initial ruling upholding Issue 3, ERNSR brushes off the impact of the Sixth Circuit's ruling as being insignificant "beyond the four corners of this case." ERNSR Opp. at 11. In fact, on the heels of that ruling, a proposal has been advanced in Ypsilanti, Michigan, to prevent that city from protecting its gay constituents. Petition at 14. Lesbians, gay men, and bisexuals in Alachua County, Florida, Riverside, California, Concord, California, and numerous Oregon cities and counties have all battled Issue-3-type measures within the past seven years.[1] This is not a dead issue, as ERNSR suggests. Measures like Issue 3 pose a clear and present danger to the integrity of the Equal Protection guarantee. *See* Brief Amici Curiae of the City of Aspen, et al., in Support of Petitioners.

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[1] *See* Comment, *Restraints on Homosexual Rights Legislation: Is There a Fundamental Right to Participate in the Political Process?*, 28 U.C. Davis L. Rev. 445, 446 n.2, 447 n.7 (1995).

Left in place, the Sixth Circuit's ruling opens the door to these city and county clones of Amendment 2 to adopt the same restrictions as Amendment 2 imposed. In *Romer*, the Court identified the "severe consequence[s]" resulting from Amendment 2. *Romer*, 517 U.S. at 629. The consequences will be just as serious if Issue 3-type measures are permitted to flourish in cities and counties.

The Court already recognized the importance of the issues in this case when it granted certiorari once before. 518 U.S. 1001 (1996). The ruling below again warrants this Court's attention to end finally the erosion of the Fourteenth Amendment's equal protection guarantee through Issue-3-type measures.

CONCLUSION

For the foregoing reasons, and for the reasons stated in the Petition, the petition for a writ of certiorari should be granted and the judgment below summarily reversed, or, alternatively, subjected to plenary review.

Respectfully submitted,

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July 6, 1998

No. 97-1795

IN THE
Supreme Court of the United States
OCTOBER TERM, 1997

EQUALITY FOUNDATION OF GREATER CINCINNATI, INC., *et al.*,
Petitioners,

v.

CITY OF CINCINNATI, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

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BRIEF OF *AMICUS CURIAE* THE NATIONAL FAIR HOUSING ALLIANCE IN SUPPORT OF PETITIONERS

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QUESTIONS PRESENTED

1. Does a federal court of appeals err when it construes the Equal Protection Clause to permit a political majority to restructure the political processes of a city government to the unique detriment of a political minority?

2. Does a federal court of appeals err when it does not require proof of a compelling state interest to justify a law that impairs the ability of a particular group to participate fully in the political process?

3. Does a federal court of appeals err when it construes the Equal Protection Clause to allow a municipal government to take actions that would be forbidden to a State government?

LIST OF PARTIES

The parties to the proceedings below were petitioners Equality Foundation of Greater Cincinnati, Inc.; Richard Buchanan; Chad Bush; Edwin Greene; Rita Mathis; Roger Asterino; and H.O.M.E., Inc.; and respondents City of Cincinnati; Equal Rights Not Special Rights; Mark Miller, Thomas E. Brinkman, Jr., and Albert Moore.

These parties, through counsel, have granted their consent to the National Fair Housing Alliance to file this brief as an *amicus curiae*. Copies of the letters granting consent have been filed with the Clerk.

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On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF OF *AMICUS CURIAE* THE NATIONAL FAIR HOUSING ALLIANCE IN SUPPORT OF PETITIONERS

The National Fair Housing Alliance, as *amicus curiae*, respectfully urges that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Sixth Circuit entered in this proceeding on October 23, 1997 (petition for rehearing and suggestion for rehearing *en banc* denied February 5, 1998).[1]

[1] Pursuant to Rule 37.6 of the Rules of the Supreme Court, *amicus* states that no counsel for a party has authored any part of this brief, and no person or entity, other than the *amicus*, its members, or its counsel, made any monetary contribution to the preparation or submission of this brief.

INTERESTS OF THE *AMICUS CURIAE*

The National Fair Housing Alliance, Inc. (NFHA) is a non-profit corporation that represents private fair housing centers throughout the United States. NFHA's purpose is the achievement of "the policy of the United States to provide, within constitutional limitations, for fair housing throughout the United States." It attempts to fulfill that purpose by conducting research into the nature and effects of housing discrimination, advocating for effective programs of fair housing compliance enforcement, and sponsoring national education conferences on fair housing issues and fair housing litigation. NFHA also attempts to identify and eliminate housing practices that are discriminatory and that constitute barriers to equal access to housing. NFHA has a direct interest in the application of statutes protecting against discrimination in housing, including local ordinances. To this end, NFHA seeks leave to participate as *amicus curiae* in those cases that involve the Constitution of the United States as it affects fair housing laws and ordinances.

OPINIONS BELOW

The opinion of the Court of Appeals for the Sixth Circuit for which *amicus* urges review on certiorari is reported at 128 F.3d 289. The Sixth Circuit rendered that opinion after its first opinion in this matter, which is reported at 54 F.3d 261, was vacated by this Court at 116 S.Ct. 2519 and remanded for further consideration in light of this Court's opinion in *Romer v. Evans*, 116 S.Ct. 1620 (1996). Also relevant are the opinions of the United States District Court for the Southern District of Ohio granting petitioners' motion for preliminary injunction, 838 F. Supp. 1235, and granting a permanent injunction, 860 F. Supp. 417.

JURISDICTION

Respondents invoked the jurisdiction of the Court of Appeals for the Sixth Circuit under 28 U.S.C. § 1291 to

appeal the judgment of the United States District Court for the Southern District of Ohio. The Sixth Circuit reversed the District Court, vacated the court's permanent injunction, and remanded the case to the District Court for entry of judgment for respondents.

Petitioners invoked the jurisdiction of this Court under 28 U.S.C. § 1254(1) to review the judgment of the Sixth Circuit. This Court granted the petition, vacated the judgment, and remanded the case for further consideration. On remand, the Sixth Circuit again held for respondents. Petitioners filed a petition for rehearing and suggestion for rehearing *en banc* that the court denied on February 5, 1998. *See* Pet'r Br., App. 126a.

The jurisdiction of this Court to review the judgment of the Sixth Circuit is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

United States Constitution, Article XIV, Section 1:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

CITY CHARTER PROVISIONS INVOLVED

Cincinnati City Charter, Article XII:

> The City of Cincinnati and its various Boards and Commissions may not enact, adopt, enforce or administer any ordinance, regulation, rule or policy which provides that homosexual, lesbian, or bisexual orientation, status, conduct, or relationship constitutes, entitles, or otherwise provides a person with

the basis to have any claim of minority or protected status, quota preference or other preferential treatment. This provision of the City Charter shall in all respects be self-executing. Any ordinance, regulation, rule or policy enacted before this amendment is adopted that violates the foregoing prohibition shall be null and void and of no force and effect.

STATEMENT OF THE CASE

In 1992, the Cincinnati City Council enacted an ordinance that prohibited discrimination based upon sexual orientation in the areas of private employment, public accommodations, and housing.

In 1993, respondent Equal Rights Not Special Rights gathered sufficient signatures to place on the ballot a proposed amendment to the Cincinnati City Charter that provided:

ARTICLE XII

NO SPECIAL CLASS STATUS MAY BE GRANTED BASED UPON SEXUAL ORIENTATION, CONDUCT OR RELATIONSHIPS.

The City of Cincinnati and its various Boards and Commissions may not enact, adopt, enforce or administer any ordinance, regulation, rule or policy which provides that homosexual, lesbian, or bisexual orientation, status, conduct, or relationship constitutes, entitles, or otherwise provides a person with the basis to have any claim of minority or protected status, quota preference or other preferential treatment. This provision of the City Charter shall in all respects be self-executing. Any ordinance, regulation, rule or policy enacted before this amendment is adopted that violates the foregoing prohibition shall be null and void and of no force and effect.

The proposed charter amendment passed, and petitioners filed a lawsuit challenging its constitutionality. Following a contested evidentiary hearing, which included evidence of housing discrimination against gay men, lesbians,

and bisexuals because of their sexual orientation, the United States District Court for the Southern District of Ohio granted petitioners' motion for a preliminary injunction against enforcement of the charter amendment. After a bench trial, the district court granted the petitioners' request for a permanent injunction.

Respondents appealed, and the Court of Appeals for the Sixth Circuit reversed, vacating the district court's permanent injunction and remanding the case for entry of judgment in favor of the respondents.

Petitioners then sought a writ of certiorari, which this Court granted. The Court vacated the judgment of the Sixth Circuit and remanded the case for further consideration in light of *Romer v. Evans,* 116 S.Ct. 1620 (1996).

On remand, the Sixth Circuit again upheld the charter amendment. Although the amendment's language was virtually identical to the Colorado constitutional amendment invalidated in *Romer,* the court held that it "merely prevented homosexuals, as homosexuals, from obtaining special privileges and preferences," in "stark contrast" to the "far broader language" of the Colorado amendment, which "could be construed to exclude homosexuals from the protection of every Colorado state law." 128 F.3d at 296. Ultimately, the Sixth Circuit held that the state-wide effect of the Colorado constitutional amendment distinguished *Romer* from the Cincinnati charter amendment. *Id.* at 301.

Petitioners sought a rehearing or a rehearing *en banc,* which was denied despite a strong dissent by six judges, who argued that the local effect of the charter amendment was "of no controlling significance for purposes of the Equal Protection Clause." *See* Pet'r Br., App. 133a. In conclusion, the dissenters stated:

We believe the panel decision in this case draws "distinctions without a difference" and failed to abide by the key ruling in *Romer* that "A law declaring that

> in general it shall be more difficult for one group of citizens than for all others to seek aid from the government is itself a denial of equal protection of the laws in the most literal sense."

Id., *quoting Romer v. Evans*, 116 S.Ct. 1620, 1628 (1996).

REASONS FOR GRANTING THE WRIT

I. THE SIXTH CIRCUIT'S DECISION CONFLICTS WITH DECISIONS OF THIS COURT THAT CONSTRUE THE EQUAL PROTECTION CLAUSE TO PROHIBIT A POLITICAL MAJORITY FROM RESTRUCTURING THE GOVERNMENTAL DECISION-MAKING PROCESS TO THE UNIQUE DETRIMENT OF A POLITICAL MINORITY.

This Court has recognized that some of the laws structuring state political institutions or political processes make it difficult for political minorities to achieve their political aims. *See Washington v. Seattle School Dist. No. 1*, 458 U.S. 457, 469-70 (1982). Such laws are permitted by the Equal Protection Clause if they allocate political power according to "neutral principles" that make it equally difficult for all groups to enact comparable laws. *Id.* at 470. But if a political majority enacts a law that departs from neutral principles by "subtly distort[ing] governmental processes in such a way as to place special burdens on the ability of minority groups to achieve beneficial legislation," then the law violates the Equal Protection Clause. *Id.* at 467.

The postulate that governmental decision-making processes must be structured according to neutral principles was one of the grounds for the decision in *Hunter v. Erickson*, 393 U.S. 385 (1969). Factually, the *Hunter* decision bears a striking resemblance to the present case. In 1964, the city council of Akron, Ohio passed a fair housing ordinance. Later, the voters of Akron amended the city charter to repeal the ordinance and to prevent the city

council from enacting any future fair housing ordinance without the approval of a majority of the voters. This Court held that the charter amendment violated the Equal Protection Clause because it created a "legislative structure" that imposed a "disadvantage" on a "particular group by making it more difficult to enact legislation on its behalf." Id. at 392-93.[2]

Two years later, the Court again examined the Equal Protection Clause's constraints on the structure of state political processes. At issue was an amendment to the West Virginia constitution that conditioned any increase of bonded indebtedness or taxes, beyond certain established rates, on approval of a 60% majority of the voters in the affected political subdivision. Distinguishing *Hunter*, the Court said:

> The class singled out in *Hunter* was clear—"those who would benefit from laws barring racial, religious, or ancestral discriminations." In contrast we can discern no independently identifiable group or category that favors bonded indebtedness over other forms of financing. Consequently no sector of the population may be said to be "fenced out" from the franchise because of the way they will vote.

Gordon v. Lance, 403 U.S. 1, 6 (1971) (internal citations omitted). Concluding its opinion, the *Gordon* Court held that "so long as such [structural] provisions do not discriminate against . . . any identifiable class they do not violate the Equal Protection Clause."[3] *Id.* at 7.

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[2] In addition, the Court determined that the amendment was unconstitutional because it used an "explicitly racial classification." *Id.* at 389.

[3] This Court has generally interpreted *Hunter* (and *Gordon*) to mean that restructuring of governmental decision-making processes violates the Equal Protection Clause when there is discrimination against an identifiable class. *E.g., Town of Lockport v. Citizens for*

Later, in *Washington v. Seattle School Dist. No. 1*, this Court applied the *Hunter* principle to invalidate a Washington initiative removing the power of local school boards to assign students to schools away from their neighborhoods for purposes of racial desegregation. 458 U.S. 457 (1982). As in *Hunter*, one of the two grounds for the Court's decision was the racial classification implicit in the law. *Id.* at 472-73, 485-86. The other ground, germane to this case, was the law's failure " 'to allocate governmental power on the basis of any general principle.' " *Id.* at 470, *quoting Hunter v. Erickson*, 393 U.S. 385, 395 (1969) (Harlan, J., concurring). As the Court put it, "[t]he evil condemned by the *Hunter* Court was not the particular political obstacle . . . imposed by the Akron charter amendment; it was, rather, the *comparative structural burden* placed on the political achievement of minority interests." *Id.* at 474 n.17 (emphasis added).

That principle of structural neutrality is violated by the city charter amendment at issue. Under the charter amendment most citizens of Cincinnati have the right to seek legislation from the city council to achieve their particular interests, "while only members of the Plaintiffs' independently identifiable group must proceed via the exceptionally arduous and costly route of amending the City Charter before they may obtain any legislation bearing on their

Community Action at the Local Level, Inc., 430 U.S. 259, 268 n.13 (1977).

It did not apply *Hunter* in that manner when it upheld a California constitutional amendment requiring approval of lower-income housing projects by local voters in *James v. Valtierra*, 402 U.S. 137 (1971), a case it decided two months before *Gordon*. The justices who dissented from the *James* opinion, however, focused their argument on the application of the suspect classification doctrine to poverty. *Id.* at 144-45 (Marshall, J., dissenting). For that reason, the Colorado Supreme Court concluded that "*James* is best understood as a case declining to apply suspect class status to the poor, and not as a limitation on *Hunter*." *Evans v. Romer*, 854 P.2d 1270, 1282 n.21 (Colo. 1993) (*en banc*).

sexual orientation." *Equality Foundation*, 860 F. Supp. 417, 433 (S.D. Ohio 1994). There is no suggestion of a neutral, general principle governing this allocation of political power, which was unprecedented in Cincinnati's history. *Equality Foundation*, 838 F. Supp. 1235, 1238 (S.D. Ohio 1993). Instead, the charter amendment simply precludes certain voters, independently identifiable by their sexual orientation,[6] from obtaining legislation of particular interest to them. By restructuring the political process to the unique disadvantage of one group of Cincinnati voters, the charter amendment violates the Equal Protection Clause "in the most literal sense." *Romer v. Evans*, 116 S.Ct. 1620, 1628 (1996).

II. THE SIXTH CIRCUIT'S DECISION CONFLICTS WITH DECISIONS OF THIS COURT THAT REQUIRE PROOF OF A COMPELLING STATE INTEREST TO JUSTIFY A LAW THAT IMPAIRS THE ABILITY OF A PARTICULAR GROUP TO PARTICIPATE FULLY IN THE POLITICAL PROCESS.

This Court's decisions on discriminatory restructuring of governmental decision-making signify that a law impairing the ability of a particular group to participate fully in the political process can be justified only by a compelling state interest. In *Hunter v. Erickson*, for example, the Court based its decision on an analogy to the re-

[6] As noted above, the *Gordon* Court focused its inquiry on whether the change made to the political process burdened a group that was identifiable by some characteristic—such as race or tax or military status—independent of its position on particular legislation. 403 U.S. at 5. Were it otherwise, any provision requiring a referendum to pass legislation would be suspect, since the legislation's supporters would have to bear the additional burden of a referendum. Under the rule of *Hunter* and *Gordon*, however, such a provision violates the Equal Protection Clause only if the legislation's supporters share some group characteristic extraneous to their position on the legislation. *Equality Foundation*, 860 F. Supp. 417, 434 n.12.

apportionment cases,[6] declaring that "the State may no more disadvantage any particular group by making it more difficult to enact legislation on its behalf than it may dilute any person's vote or give any group a smaller representation than another of comparable size." 393 U.S. 385, 393 (1969). Similarly, in *Gordon v. Lance*, the Court likened the issue of structural discrimination against an identifiable class of voters to discrimination in access to the ballot. 403 U.S. 1, 5 (1971).[6]

In neither case did the Court discuss the level of judicial scrutiny it used. Significantly, however, the precedents relied upon by the Court in *Hunter* and *Gordon* were cases that applied strict scrutiny.[7] Strict scrutiny was necessary and appropriate in those cases because:

> The presumption of constitutionality and the approval given "rational" classifications in other types of enactments are based on an assumption that the *institutions of state government are structured so as to represent fairly all the people.* However, when the challenge to the statute is in effect a challenge of this basic assumption, the assumption can no longer serve as the basis for presuming constitutionality.

Kramer v. Union Free School District, 395 U.S. 621, 628 (1969) (emphasis added).[8]

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[5] 393 U.S. 385, 393, *citing Reynolds v. Sims*, 377 U.S. 533 (1964) *and Avery v. Midland County, Texas*, 390 U.S. 474 (1968).

[6] The *Gordon* Court relied on *Gomillion v. Lightfoot*, 364 U.S. 339 (1960); *Harper v. Virginia State Bd. of Elec.*, 383 U.S. 663 (1966); *Kramer v. Union Free Sch. Dist.*, 395 U.S. 621 (1969); and *Carrington v. Rash*, 380 U.S. 89 (1965).

[7] *E.g., Reynolds v. Sims*, 377 U.S. 533, 562 (1964); *Kramer v. Union Free Sch. Dist.*, 395 U.S. 621, 626-30 (1969).

[8] Indeed, this Court has long considered "legislation which restricts those political processes which can ordinarily be expected to bring about repeal of undesirable legislation" and governmental action that "tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities" to be subjects requiring "more exacting judicial scrutiny." *United States v. Carolene Products Co.*, 304 U.S. 144, 152 n.4 (1938). Such policing of the process of representation is a matter uniquely within the competence of this Court. JOHN HART ELY, DEMOCRACY AND DISTRUST 81-82, 120 (1980).

In this case, the district court found that under the charter amendment only one group of people is required to amend the Cincinnati City Charter before it can obtain legislation for its protection and benefit. *Equality Foundation*, 860 F. Supp. 417, 433 (S.D. Ohio 1994). The court then held that the charter amendment's change to the structure of the Cincinnati city government prevented it from fairly representing that group of people. *Id.* at 433-34. Because petitioners' factual and legal challenge to the charter amendment questions the assumption of fair structure upon which "rational basis" scrutiny is founded, the presumption of constitutionality underlying that test is not applicable in this case. Instead, this Court's jurisprudence dictates that strict scrutiny must be applied.

III. THE SIXTH CIRCUIT'S DECISION, WHICH PURPORTS TO ALLOW MUNICIPAL GOVERNMENTS TO TAKE ACTIONS THAT WOULD BE FORBIDDEN TO STATE GOVERNMENTS, IS IN CONFLICT WITH DECISIONS OF THIS COURT APPLYING THE EQUAL PROTECTION CLAUSE.

In *Romer v. Evans*, this Court invalidated an amendment to the Colorado constitution that was markedly similar to the city charter amendment at issue here. Considering the effects of the Colorado amendment, which disqualified a class of persons from the right to seek specific protection from the government, this Court declared:

> It is not within our constitutional tradition to enact laws of this sort. Central both to the idea of the rule of law and to our own Constitution's guarantee of equal protection is the principle that government *and each of its parts* remain open on impartial terms to all who seek its assistance. . . .

116 S.Ct. 1620, 1628 (1996) (emphasis added).

The Sixth Circuit offhandedly distinguished *Romer* by observing that the charter amendment pertained only to the City of Cincinnati, not to the entire State of Ohio. *Equality Foundation*, 128 F.3d 289, 297-301 (6th Cir. 1997). That putative distinction, however, is contradicted by settled precedent:

> The Equal Protection Clause reaches the exercise of state power however manifested, whether exercised directly or through subdivisions of the state. . . . [I]t is now beyond question that a State's political subdivisions must comply with the Fourteenth Amendment. The actions of local government *are* the actions of the State.

Avery v. Midland County, Texas, 390 U.S. 474, 479-80 (1968). It is irrelevant whether the government that has denied some of its citizens equal protection of the laws is a municipality or a State: in either instance, the Equal Protection Clause is offended.[9] The Sixth Circuit erred by ignoring this settled rule.

CONCLUSION

For the reasons set forth above, petitioners' request for a writ of certiorari should be granted.

Respectfully submitted,

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[9] *Compare Hunter v. Ericson*, 393 U.S. 385, 392-93 (1969) (holding that the Fourteenth Amendment did not allow the City of Akron to create a legislative structure that disadvantaged a particular group by making it more difficult for that group to enact legislation on its behalf).

No. 97-1795

In The

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October Term, 1997

EQUALITY FOUNDATION OF GREATER CINCINNATI, INC., RICHARD BUCHANAN, CHAD BUSH, EDWIN GREENE, RITA MATHIS, ROGER ASTERINO, AND H.O.M.E., INC.,

Petitioners,

v.

THE CITY OF CINCINNATI, EQUAL RIGHTS NOT SPECIAL RIGHTS, MARK MILLER, THOMAS E. BRINKMAN, JR., AND ALBERT MOORE,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

BRIEF OF THE CITIES OF ASPEN, ATLANTA, BOULDER, LOS ANGELES, NEW YORK, PHILADELPHIA, PORTLAND, SAN FRANCISCO, AND SEATTLE AS AMICI CURIAE IN SUPPORT OF PETITIONERS

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STATEMENT OF INTEREST

Amici curiae – the cities of Aspen, Atlanta, Boulder, Los Angeles, New York, Philadelphia, Portland, San Francisco, and Seattle submit this brief in support of petitioners, Equality Foundation of Greater Cincinnati, *et al.*, pursuant to Supreme Court Rule 37.4. Amici are collectively referred to as "the Cities."

This case concerns whether "Issue 3," an amendment to the Cincinnati City Charter violates the Equal Protection Clause of the Fourteenth Amendment. Issue 3 is identical in all relevant respects to the Colorado constitutional amendment this Court invalidated in *Romer v. Evans*, 517 U.S. 620 (1996).

The Cities have a direct interest in this matter. By holding that Issue 3 does not violate the Equal Protection Clause, the Sixth Circuit has created a novel two-tiered approach to equal protection law. If allowed to stand, this approach would undermine the ability of the Cities to treat all their citizens impartially, and would create confusion as to when actions by the Cities might violate the Equal Protection Clause.

The Cities urge this Court to overturn this unprecedented two-tiered approach to the Equal Protection Clause by summarily reversing the Sixth Circuit's decision or subjecting it to plenary review.

STATEMENT OF THE CASE

Amici adopt the Statement of the Case set forth by petitioners.

REASONS FOR GRANTING THE WRIT

In upholding Issue 3, the Sixth Circuit refused to follow the squarely applicable precedent of *Romer*. In *Romer*, this Court invalidated "Amendment 2," a Colorado constitutional amendment barring any protection against discrimination by all levels of state government on the basis of homosexual, lesbian or bisexual status. 517 U.S. at 623. Issue 3 is identical in all relevant ways to Amendment 2. Both measures single out a class of gay, lesbian and bisexual citizens. Both measures deny only this class the right to seek government protection against discrimination. And both measures repeal existing laws and policies and forbid the adoption of future ones protecting this class against discrimination, absent a vote by the full electorate.[1]

Nevertheless, the Sixth Circuit upheld Issue 3, distinguishing its local impact from the statewide reach of

[1] Because the text of the two measures is virtually identical, it would be difficult to find a case more clearly governed by *Romer*. It is unclear whether the Sixth Circuit's effort to distinguish *Romer* relies on the minor differences in the language of the two measures. While the Cities believe these minor differences have no constitutional significance, if this Court does not summarily reverse the Sixth Circuit, it should grant *certiorari* to consider this question.

Colorado's Amendment 2. "*Romer* should not be construed to forbid *local* electorates the authority, via initiative, to instruct their elected . . . representatives . . . to withhold special . . . protections . . . ."[2] *Equality Foundation of Greater Cincinnati, Inc. v. City of Cincinnati* ("*Equality Foundation 2*"), 128 F.3d 289, 298 (6th Cir. 1997) (emphasis added). The Sixth Circuit's novel two-tiered approach is unsupported by this Court's precedents. It deprives citizens of their right to impartial treatment from cities, and creates confusion for cities about their obligations under the Equal Protection Clause.

I. The Sixth Circuit's Decision Deprives Citizens Of Their Right To Impartial Treatment From Cities.

The Equal Protection Clause of the Fourteenth Amendment commands that government shall not "deny to any person within its jurisdiction the equal protection of the laws." U.S. Const., amend. XIV. In *Romer*, this Court reaffirmed the meaning of this command: "*[G]overnment and each of its parts* remain open on *impartial* terms to all who seek its assistance." 517 U.S. at 633. This Court accordingly held that "A law declaring that in general it shall be more difficult for one group of citizens than for all others to seek aid from the government is

[2] As this Court noted in *Romer*, there is nothing special about the protections from discrimination withheld by measures like Amendment 2 and Issue 3. "These are protections taken for granted by most people either because they already have them or do not need them; these are protections against exclusion from an almost limitless number of transactions and endeavors that constitute ordinary civic life in a free society." 517 U.S. at 631.

itself a denial of equal protection of the laws in the most literal sense." *Id.* Thus, *Romer* did not turn on the statewide reach of Amendment 2, but on the *special disability* Colorado imposed upon the class of gay, lesbian, and bisexual people in relation to all other groups. *Id.* at 631.

Issue 3 imposes a disability *identical* to that imposed by Amendment 2. Before Issue 3, gay, lesbian and bisexual people had the same right to seek legal protection from discrimination as other groups. They could obtain such protection by ordinance of the Cincinnati City Council, or through adoption and administration of regulations, rules or policies by any department, board or city official. Issue 3 forecloses these "ordinary municipal political processes" to gays, lesbians and bisexuals. Instead, this group must now take the extraordinary steps to obtain an amendment to the City Charter.[3] As the

[3] The Sixth Circuit suggests that "ordinary municipal political processes" would remain open to gays, lesbians and bisexuals. *Equality Foundation 2*, 128 F.3d at 297. The Sixth Circuit gravely misunderstands the effect of an amendment to a city's charter. In states where the state constitution contains a home rule provision, a city's charter is equivalent to a local constitution. A city charter is to a city what the state constitution is to a state. 2A Eugene McQuillin, *The Law of Municipal Corporations* § 9.03 (3rd ed. 1993). Thus, the local effect of an amendment to a city charter is equivalent to the statewide effect of an amendment to a state constitution. "Ordinary municipal processes" are no longer unavailable to gay, lesbian and bisexual people in Cincinnati because these processes are subordinate to the charter provision adopted as Issue 3. As the district court held, "[A]ny and all laws, regulations, ordinances or policies of the City of Cincinnati – with the exception of other charter provisions – are inferior [to Issue 3], and any legislation

District Court found: "Amending the city charter is a far more onerous and resource-consuming task than is lobbying the City Council or city administration for legislation; it requires a city wide campaign and support of a majority of voters." *Equality Foundation of Greater Cincinnati, Inc. v. City of Cincinnati* ("*Equality Foundation 1*"), 860 F. Supp. 417, 427 (S.D. Ohio 1994). By contrast, all other groups can approach all branches and all levels of city government to obtain legal protection against discrimination. By making it "more difficult for one group of citizens than for all others to seek aid from the government," Issue 3 constitutes a "denial of equal protection of the laws in the most literal sense." *Romer*, 517 U.S. at 633.

An example illustrates this "special disability." Suppose that a city employee who processes building permits refuses to process permit applications submitted by gay, lesbian or bisexual contractors because the employee does not want to encounter them on construction sites. An applicant complains that the city has discriminated against him by denying a building permit because he is gay. The applicant could not obtain legal protection from discrimination through "ordinary municipal political processes." For example, he could not ask the Department to issue a directive that staff may not take an applicant's homosexual, lesbian or bisexual orientation into account when issuing building permits. Under Issue 3, such a directive would unlawfully "enact [a] policy which provides that homosexual, lesbian or bisexual orientation . . . provides a person with the basis to have any

or policy to the contrary [of Issue 3] is invalid." *Equality Foundation 1*, 860 F. Supp. at 428.

claim of . . . protected status." Nor could the applicant ask the City Council to enact an ordinance banning consideration of an applicant's homosexual, lesbian or bisexual orientation in deciding whether to grant or deny a building permit. Under Issue 3, such a measure would unlawfully "enact [an] ordinance which provides that homosexual, lesbian or bisexual orientation . . . provides a person with the basis to have any claim of . . . protected status." Instead, the applicant must appeal to every voter in the City to enact a charter amendment to obtain legal protection from discrimination based on his sexual orientation. Issue 3 thus imposes the same "special disability" on gay, lesbian and bisexual people that this Court condemned in *Romer*.

Like Amendment 2, Issue 3 "is unprecedented in our jurisprudence" in its "disqualification of a class of persons from the right to seek specific protection from the law." *Romer*, 517 U.S. at 633. Should the Sixth Circuit's decision be allowed to stand, city governments could be forced to shut their doors to a class of citizens seeking legal protection from discrimination, while state governments could not. Cities alone among all the political subdivisions could be rendered powerless to protect a class of citizens from discrimination based on their status, no matter how invidious the injury, no matter how unjustified the harm.

In other contexts, this Court has recognized that cities are uniquely positioned to identify and to respond to invidious discrimination. *See, e.g., Brown v. Bd. of Educ.*, 349 U.S. 294, 299 (1955) (local authorities have "the primary responsibility for elucidating, assessing, and solving" the problems of desegregation); *Missouri v. Jenkins*,

495 U.S. 33, 52 (1990) ("local officials should at least have the opportunity to devise their own solutions to these problems"). This Court has explained: "Authorizing and directing local government institutions to devise and implement remedies not only protects the functions of those institutions but, to the extent possible, also places the responsibility for solutions to the problems of segregation upon those who have themselves created the problems." *Jenkins*, 495 U.S. at 51. Although these cases involved suspect classifications, they recognize that the power to address invidious discrimination should rest with local authorities.

The Sixth Circuit's decision would mean that cities could be stripped of this power to protect a class of citizens from invidious discrimination. To permit this ruling that cities may be *less* impartial in their dealings with their citizens than states undermines the very meaning of "the equal protection of the laws." Under our federalist system of government, most of "the limitless number of transactions and endeavors that constitute ordinary civic life" occur at the local level. *See Romer*, 517 U.S. at 631.

Cities are not required to legislate against discrimination at all, and cities are free to repeal such protections once extended. But amending a city's charter to deny a class of citizens even the *possibility* of seeking legal protection from discrimination from all branches and levels of city government involves a fundamentally different action. Under *Romer*, all Cincinnati citizens, including gay, lesbian and bisexual citizens, must have an equal right to petition their elected representatives and other city officials for protection against discrimination. All

Cincinnati citizens must have an equal right to be treated impartially by city government in this respect.

II. The Sixth Circuit's Decision Unsettles Clear Law About Cities' Obligations Under The Equal Protection Clause.

The Sixth Circuit's decision can stand only if different Equal Protection standards apply to cities than to states. According to the Sixth Circuit, although a state constitutional amendment that shuts the doors of state government to citizens seeking legal protection from discrimination would violate the Equal Protection Clause, a similar city charter amendment that shuts the doors of *local* government would not. The Sixth Circuit's decision would afford *less* protection under the Equal Protection Clause from actions taken by cities than from actions taken by states.

This novel two-tiered approach to the Equal Protection Clause finds no support in this Court's precedents. To the contrary, this Court always has applied the same Equal Protection standards to both cities and states. *See, e.g., Avery v. Midland County*, 390 U.S. 474, 480 (1968) ("it is now beyond question that a State's political subdivisions must comply with the Fourteenth Amendment. The actions of local government are the actions of the State."); *Hunter v. Erickson*, 393 U.S. 385, 389-90, 392 (1969) (for the purposes of the Equal Protection Clause, a city "unquestionably wields state power," and a law that otherwise violates the Clause is not permissible simply because passed by local referendum); *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 173 (1970) ("a law whose source is a town

ordinance can offend the Fourteenth Amendment even though it has less than state-wide application"); *United Bldg. & Constr. Trades Council v. Mayor of Camden*, 465 U.S. 208, 215 (1984) ("what would be unconstitutional [under the Equal Protection Clause] if done directly by the State can no more readily be accomplished by a city deriving its authority from the State").

If upheld, the Sixth Circuit's extraordinary departure from this Court's Equal Protection jurisprudence would unsettle an entire body of constitutional law. Under the Sixth Circuit's reasoning, desegregation cases that addressed *state* bans on minority admissions to *state* schools would not govern the actions of cities and local school districts. *See, e.g., Sweatt v. Painter*, 339 U.S. 629 (1950) (overturning state law forbidding admission of minorities to state law school). Similarly, anti-discrimination cases addressing *state* laws would not apply to cities. *See, e.g., Loving v. Virginia*, 388 U.S. 1 (1967) (invalidating state law provisions prohibiting interracial marriage); *Reitman v. Mulkey*, 387 U.S. 369 (1967) (invalidating state constitutional amendment prohibiting any interference by the state with the right to sell, lease or rent private property). Even tax cases addressing *state* measures would not apply to cities. *See, e.g., Metropolitan Life Insurance Co. v. Ward*, 470 U.S. 869 (1985) (striking down state tax imposing substantially higher rates on extraterritorial insurance companies).

The Sixth Circuit's decision creates a profound break in a fundamental, settled area of law. If allowed to stand, the Cities would face immediate confusion about what standard of equal protection applies to a wide range of actions taken by their legislative bodies and executive

staff and departments. Cities need this Court's guidance to determine whether, as the Sixth Circuit has ruled, their actions are subject to a lower standard under the Equal Protection Clause.

CONCLUSION

The Cities of Aspen, Atlanta, Boulder, Los Angeles, New York, Philadelphia, Portland, San Francisco, and Seattle respectfully join in the request filed by Equality Foundation of Greater Cincinnati, *et al.*, for this Court to summarily reverse the decision of the Sixth Circuit or subject it to plenary review.

Dated: June 24, 1998

Respectfully submitted,

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SUPREME COURT OF THE UNITED STATES

EQUALITY FOUNDATION OF GREATER CINCINNATI, INC., ET AL. *v.* CITY OF CINCINNATI ET AL.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

No. 97–1795. Decided October 13, 1998

The petition for a writ of certiorari is denied.

Opinion of JUSTICE STEVENS, with whom JUSTICE SOUTER, and JUSTICE GINSBURG join, respecting the denial of the petition for a writ of certiorari.

As I have pointed out on more than one occasion, the denial of a petition for a writ of certiorari is not a ruling on the merits.[1] Sometimes such an order reflects nothing more than a conclusion that a particular case may not constitute an appropriate forum in which to decide a significant issue. In this case, the Sixth Circuit held that the city charter "merely removed municipally enacted special protection from gays and lesbians."[2] *Equality*

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[1] *Brown* v. *Texas*, 118 S. Ct. 355, 356 (1997); *Lackey* v. *Texas*, 514 U. S. 1045, 1047 (1995); *Tennessee* v. *Barber*, 513 U. S. 1184, 1184 (1995).

[2] The relevant amendment to the city charter reads,

> "The City of Cincinnati and its various Boards and Commissions may not enact, adopt, enforce or administer any ordinance, regulation, rule or policy which provides that homosexual, lesbian, or bisexual orientation, status, conduct, or relationship constitutes, entitles, or otherwise provides a person with the basis to have any claim of minority or protected status, quota preference or other preferential treatment. This provision of the City Charter shall in all respects be self-executing. Any ordinance, regulation, rule or policy enacted before this amendment is adopted that violates the foregoing prohibition shall be null and void and of no force or effect." *Equality Found. of Greater Cincinnati, Inc.* v. *City of Cincinnati*, 128 F. 3d 289, 291 (CA6 1997).

Found. of Greater Cincinnati, Inc. v. *City of Cincinnati*, 128 F. 3d 289, 301 (CA6 1997). This construction differs significantly, although perhaps not dispositively, from the reading advocated by the petitioners. They construe the charter as an enactment that "bars antidiscrimination protections only for gay, lesbian and bisexual citizens."

This Court does not normally make an independent examination of state law questions that have been resolved by a court of appeals. See *Bishop* v. *Wood*, 426 U. S. 341, 346–347 (1976). Thus, the confusion over the proper construction of the city charter counsels against granting the petition for certiorari. The Court's action today should not be interpreted either as an independent construction of the charter or as an expression of its views about the underlying issues that the parties have debated at length.